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No. 82-494

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1982

BATH IRON WORKS CORPORATION,

and

AMERICAN MUTUAL LIABILITY
INSURANCE COMPANY,
Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION
PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

and

DONALD J. SIMPSON,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

1. Whether the First Circuit Court of Appeals was correct in ruling that Calbeck v. Travelers Insurance Co., 370 U.S. 114 (1962), which extended the jurisdiction of the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA") to new ship construction over navigable waters, should apply retroactively to a compensable injury that occurred twenty-one (21) years prior to Calbeck, when the case law provided, under the "maritime but local" doctrine, that the claimant could recover workers' compensation benefits only under state law.

2. Whether the First Circuit Court of Appeals was correct in reaching a result different from that which the Fifth Circuit Court of Appeals reached on similar facts in Shea v. Texas Employers' Ins. Assoc., 383 F.2d 16 (5th Cir. 1967), by ruling that an employee injured before 1972 could pursue a claim under the LHWCA after litigating a claim for state workers' compensation benefits to a successful conclusion, despite the clear and unequivocal language in 33 U.S.C. § 903(a) that compensation under the LHWCA was payable:

> ". . . only if the disability or death results from an injury occurring upon the navigable waters of the United States. . . and if recovery for the disability or death through workers' compensation proceedings may not validly be provided by State law."
> (Emphasis added)

LIST OF PARTIES*

The parties in case No. 81-1455 were Donald J. Simpson, as petitioner, and the Director, Office of Workers' Compensation Programs, United States Department of Labor, Bath Iron Works Corporation and American Mutual Liability Insurance Company, as the respondents.

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*Petitioner, Bath Iron Works Corporation, reports, pursuant to Rule 28.1 of the Rules of this Court, that Bath Iron Works Corporation is a wholly owned subsidiary of Congoleum Corporation.

Petitioner American Mutual Liability Insurance, reports, pursuant to Rule 28.1 of the Rules of this Court, that American Mutual Liability Insurance Company has the following affiliates: American Mutual Insurance Company of Boston, American Policyholders' Insurance Company, American Mutual Life Insurance Company, American Mutual Corporation, Boothbay Mutual.

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DIRECTOR, OFFICE OF WORKERS' COMPENSATION
PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

and

DONALD J. SIMPSON,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Petitioners Bath Iron Works Corporation (Bath) and American Mutual Insurance Company (American Mutual) pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit, which applied Calbeck v. Travelers Insurance Company, 370 U.S. 114 (1962) retroactively to an injury that

occurred during activity "maritime but local" twenty-one (21) years before the Calbeck decision, thereby retroactively extending the petitioners' workers' compensation liability under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §§ 901 et. seq., and which held that litigation to a judgment in State workers' compensation proceedings did not bar an employee injured before 1972 from proceeding with another claim for the same injury under the LHWCA, despite that language in 33 U.S.C. § 903(a) which provides that compensation was payable under that Act only if recovery may not validly be provided by State law.

OPINIONS BELOW

The opinion of the Supreme Judicial Court of the State of Maine, issued on May 18, 1949, is reported as Simpson's Case, 144 Me 162 (Me. 1949), and appears as Appendix E (App. 66a-72a) hereto. The Decision and Order of the Administrative Law Judge (No. 78-LHCA-957), issued on November 3, 1978, is not reported but appears as Appendix D (App. 63a-65a) hereto. The Decision and Order of the Benefits Review Board (No. 78-620), dated June 11, 1981, is reported at 13 BRBS 970 and appears as Appendix B (App. 21a-47a) hereto. The dissenting opinion of Administrative Appeals Judge Miller, issued separately on July 28, 1981, is reported at 13 BRBS 983, and appears as Appendix C (App. 48a-62a) hereto. The Opinion of the United States Court of Appeals for the First Circuit (No. 81-1455), from which certiorari is sought, dated June 23, 1982, is not yet reported but appears as Appendix A (App. 1a-20a) hereto.

JURISDICTION

The Court of Appeals' Decision in this case was rendered on June 23, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTES

The relevant statutory provisions are set forth as Appendix G (App. 74a-76a) hereto.

STATEMENT OF THE CASE

This case raises a question that the Benefits Review Board characterized as "an issue of first impression" with "important and potentially far reaching effect". (App. 22a) The issue on appeal is whether an employee, who was injured in 1941 while working on a ship under construction and who received the maximum state workers' compensation benefits allowed by law, is entitled to compensation under the version of 33 U.S.C. § 903(a) in effect at the time of his injury.[1] That section provided:

> (a) Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law.

The essential facts of this case were undisputed. On November 21, 1941, Mr. Simpson, while in the employ of Bath Iron Works Corporation, sustained a severe spinal injury when he fell to the ground from the deck of a vessel under construction. As a result of the injury, Mr. Simpson has been

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[1] In 1972, § 3(a) was amended. The parties agree that those amendments had no effect on Simpson's already existing claim.

totally disabled. Following the accident, he retained counsel and sought relief under the Workmen's Compensation Act of the State of Maine. After obtaining the maximum compensation benefits allowed under the State Act, Mr. Simpson, through counsel, brought an additional claim in an attempt to obtain medical benefits under the State law in excess of the $6,000 ceiling on compensation. The matter was litigated to a conclusion in the Maine Supreme Judicial Court and the decision of that Court establishes that the Employer satisfied its obligations under the State Act and paid to Mr. Simpson the maximum benefits to which he was entitled under State law. Simpson's Case, 144 Me. 162 (1949) (App. 66a).

The decision in Simpson's Case was rendered in 1949. The decision itself establishes that compensation payments under State law ended on April 8, 1948. At that time, Mr. Simpson gave to the Employer a settlement receipt acknowledging that the full sum of monies owed under State law had been paid to him. In April of 1977, 36 years after the injury and 29 years after satisfaction of the State judgment, Mr. Simpson filed a claim for benefits for the injury of November 21, 1941 under the Longshoremen's and Harbor Workers' Compensation Act.

Because the questions surrounding the nature and extent of necessary medical services covering a 36-year span of time were extraordinarily complex, and because of the substantial nature of the jurisdictional issues, the parties agreed to bifurcate the hearing and to present to the Administrative Law Judge only the issues involving the jurisdictional issues involved in this claim for compensation. The Administrative Law Judge, construing 33 U.S.C. § 903(a), and relying on the decision of the Fifth Circuit Court of Appeals in Shea v. Texas Employers' Ins. Assoc., 383 F.2d 16 (5th Cir. 1967), denied the claim for compensation and held that Mr. Simpson had no right to benefits under the Longshoremen's Act because the State judgment conclusively established that recovery was validly provided by State law, and the claim was therefore no longer covered under § 3(a), which provided for benefits "only if recovery for disability or death through workmen's compenation proceedings may not validly be provided by State law" (App. 63a-65a).

On appeal, the Benefits Review Board affirmed the dismissal of the Employee's claim, although it reached its result based upon a rationale different from that articulated by the Adminisrative Law Judge. The Benefits Review Board held that the Supreme Court's decision in Calbeck v.

Travelers Ins. Co., 370 U.S. 114 (1962), which extended the jurisdictional scope of the Longshoremen's and Harbor Workers' Compensation Act of 1927, and upon which the Employee based his claim, could not be retroactively applied so as to confer the jurisdiction of the LHWCA to this case. The Benefits Review Board, in an extensive opinion, analyzed the considerations that apply to the question of retroactivity, as set forth in the case of Chevron v. Huson, 404 U.S. 97 (1971). The Benefits Review Board concluded that at the time of the injury of the Employee in this case, Bath Iron Works, which was engaged exclusively in new ship construction, fell within the well established "maritime but local" doctrine, which meant that Bath's employees could recover workers' compensation benefits only under State law. Therefore, the Employer had no reason to believe that the Longshoremen's Act was applicable and had no reason to file a first report of injury within 10 days of the injury, which is required by 33 U.S.C. § 930(a), in order to trigger the commencement of the one-year limitation for the filing of a claim. 33 U.S.C. § 913(a); 33 U.S.C. § 930(f). Moreover, the Benefits Review Board concluded that the decision in Calbeck to extend concurrent federal jurisdiction to areas that were traditionally the exclusive province of state

workers' compensation acts was not clearly foreshadowed by prior case law, which the Court characterized as being "frequently unclear and conflicting". (App. 42a) Noting that one of the purposes of Calbeck was to avoid the situation where an employee might be left without a remedy by virtue of a "vacuum" of coverage in areas where state acts do not cover maritime workers within areas of "local concern", the Board concluded that this consideration was not applicable to this claim in view of the fact that Mr. Simpson received State benefits and was not left without remedy. Expressing concern that a retroactive application of Calbeck would produce a flood of litigation of stale and uncertain claims, and noting the unfair impact of such a retroactive application on employers similarly situated to Bath Iron Works, the Benefits Review Board refused to apply Calbeck retroactively and affirmed the decision and order of the Administrative Law Judge denying benefits, holding that the Employee was not covered by the federal Act as the result of application of the "maritime but local" rule, which was incorporated in 33 U.S.C. § 903(a) at the time of his injury.[2]

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[2]The Benefits Review Board, because it resolved the case on the issue of coverage, did not reach the other issues raised on appeal: 1) whether the injury occurred over navigable waters; 2) whether

The Court of Appeals for the First Circuit reversed the Benefits Review Board, and held that the extension of jurisdiction set forth in Calbeck should be applied to workers' injuries that antedated the decision. The First Circuit expressly acknowledged that it was addressing a question on which the Supreme Court had not yet given explicit guidance (App. 9a). Moreover, the Court of Appeals acknowledged that Calbeck's line of analysis stunned most legal commentators and was not clearly foreshadowed (App. 11a, 12a). Analyzing the same cases that were considered extensively by the Benefits Review Board, the First Circuit reached a different result. Moreover, unable to distinguish the decision of the Fifth Circuit Court of Appeals in Shea v. Texas Employers' Ins. Assoc., supra, the Court of Appeals refused to follow Shea, stating that the Fifth Circuit "misapprehended the import of Calbeck" (App. 19a).

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res judicata or the doctrine of election of remedies applies; 3) whether the claim is barred by the statute of limitations and the equitable doctrine of laches; and 4) whether the § 20(a) presumption applies to the issue of jurisdiction (App. 47a).

STAGES AT WHICH FEDERAL QUESTIONS WERE RAISED AND PRESERVED

Both Bath Iron Works Corporation and its insurer, American Mutual Liability Insurance Company, requested dismissal of this claim under 33 U.S.C. § 903(a), expressly relying on the decision of the Fifth Circuit Court of Appeals in Shea v. Texas Employers' Ins. Assoc., supra, and expressly opposing retroactive application of Calbeck. All three bodies below specifically ruled on the issues presented in this Petition (App. 1a-20a, 21a-62a, 63a-65a).

BASIS FOR FEDERAL JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) to pass upon the Court of Appeals' interpretation of Section 903(a) of the Longshoremen's and Harbor Workers' Act of 1927.

ARGUMENT

This case deserves plenary review by this Court because it presents "an issue of first impression" with "important and potentially far reaching effect" (App. 22a), which requires interpretation of a federal statute and the manner in which that statute is affected by a decision of this Court. If the Decision of the First Circuit Court of Appeals is not overturned, employers who were involved in new ship construction during the 1940's and 1950's will be faced with the impossible task of attempting to produce "substantial evidence" to rebut the presumption of compensability of injuries up to 40 years old. See 33 U.S.C. § 920(a). The difficulty inherent in the production of evidence to establish notice defenses, or to contest the nature and extent of past disability without the opportunity for medical examination, or to establish the availability of suitable alternate employment in the employee's community during a claimed period of past disability, needs no further elaboration. Moreover, the statute of limitation contained in the LHWCA will not be a defense available to employers in view of the fact that, as the Benefits Review Board noted, the statutory periods will not run in view of the fact that employers who could not foresee future judicial extension of federal jurisdiction

justifiably satisfied their compensation obligations by paying benefits under state workers' compensation law and failed to file federal first reports of injury. The Decision of the Court of Appeals, if not overruled, will produce a flood of stale litigation.[3]

I. The Decision of the Court of Appeals to Apply Calbeck Retroactively was Erroneous

A. Factors to Consider in Determining Whether a Case is to be Given Retroactive Effect.

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[3]The Benefits Review Board, which is intimately connected with the Administration of the Longshoremen's Act, considered that retroactive application of Calbeck would produce a flood of litigation from workers and employers similarly situated to the claimant and the employer in this case (App. 45a). The First Circuit was "unmoved by the Board's fear of a flood of litigation" stating that that fear was "illogical" for the reason that any litigation stimulated by Calbeck would have developed in the 1960's and not in the 1980's (App. 16a). The First Circuit ignored the fact that its decision was the first decision of any Court of Appeals that applied Calbeck retroactively. Moreover, it ignores the fact that the only other case dealing with the question of whether an employee injured in new ship construction, who recovered state benefits pursuant to a State judgment, may thereafter pursue a claim under the Longshoremen's Act, was the case of the Fifth Circuit Court of Appeals in Shea v. Texas Employers' Ins. Assoc., supra. Shea, decided by the Fifth Circuit in 1967, undoubtedly discouraged any such claims.

The traditional presumption is that Court decisions are intended to receive general retroactive effect. It has been established, however, that both state courts, see Great Northern Railway v. Sunburst Co., 287 U.S. 358 (1927), and federal courts, see Linkletter v. Walker, 381 U.S. 618 (1965), may legitimately conclude that justice requires a decision to be applied nonretroactively. Modern courts have frequently held that cases are to be applied prospectively only where a well-settled rule of law is overturned, and it appears unfair and unnecessary to upset the expectations of the parties. E.g., Linkletter, supra. The Supreme Court set forth a three-pronged test to determine whether to apply a rule prospectively only in the case of Chevron Oil Co. v. Huson, 404 U.S. 97 (1971). The following factors determine whether a decision will be applied prospectively only: (1) it must establish a new principle of law, either by overruling clear past precedent or by deciding an issue of first impression whose resolution was not clearly foreshadowed; (2) retroactive application will not further the purposes of the rule; and (3) it would be inequitable to apply the rule retroactively. Chevron Oil Co, supra at 106-107. The First Circuit Court of Appeals in this case stated that the central question of retroactivity is:

> ...was reliance on a contrary rule so

> justified and the frustration of expectation so detrimental as to require deviation from the traditional presumption of retroactivity (App. 9a)?

The Court of Appeals, before applying Chevron Oil's factors to the case presently before the Court, addressed the question of whether the factors, including the issue of reliance, should be analyzed in light of the particular litigants in the given case, or in light of general patterns throughout society (App. 9a). The Court of Appeals acknowledged that the Supreme Court has not yet given explicit guidance on this issue, and candidly acknowledged that its view differed from the Court of Appeals for the District of Columbia, and that this difference had an impact in the resolution of the case. See App. 9a; Wachovia Bank & Trust Co. v. National Student Marketing Corp., 650 F.2d 342 (D.C. Cir. 1980). The Court below concluded that general perspectives should control, and that decisions on retroactivity should not be affected by specific and possibly abberational facts in a given case. To this extent, the petitioners concur with the reasoning of the Court of Appeals. The Court below then erroneously considered the question of retroactivity by analyzing the state of the law at the time when Calbeck was handed down, rather than by analyzing the law at the time the particular claim in this case arose (App 10a-11a). The Court of Appeals specifically acknowledged its

disagreement with the Court of Appeals for the Circuit of the District of Columbia in this respect. See (App. 11a, fn. 8). The Court below erroneously assumed that an analysis of the state of the law at the time a claim arose would place undue emphasis on the particular litigants' reliance interests, rather than on general patterns throughout society. In this regard, it ignored its own statement that the circumstances of particular litigants are important when they typify general patterns of reliance (App. 10a). To the extent that the state of the law at the time a particular claim arose affects general patterns of reliance in that law at that time, it must be considered in the analysis of the question of retroactivity. The Court of Appeals' conclusion to the contrary effectively removed the third factor from the Chevron Oil analysis of retroactivity. It is impossible to measure the reasonableness and extent of reliance of the part of the employer in paying state act benefits and in not filing federal forms for a 1941 injury by examining the law as it obtained in 1962.[4]

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[4]Had the Longshoremen's and Harbor Workers' Compensation Act been applicable to Mr. Simpson's claim, the employer would have been obligated to file a First Report of Injury within ten days of the injury of November 21, 1941. 33 U.S.C. § 930. Had the employer filed the Report in this case, the

Plenary review of the Decision of the Court of Appeals should be granted with respect to this aspect of the Court's Decision alone. It is necessary to clarify on what basis decisions of this Court will be retroactively applied, and to resolve a dispute between the Circuit Courts of Appeal.

B. Benefits Review Board was Correct in Refusing to Apply Calbeck Retroactively to This Case, and in Ruling that the Claim for Benefits Under the LHWCA was Barred by 33 U.S.C. § 903(a).

The Decision of the Benefits Review Board not to apply Calbeck retroactively to this claim followed closely the analysis set forth by the Supreme Court in Chevron Oil Co. v. Huson, supra.

Chevron Oil's first factor focuses on how much a decision changes the law. The Benefits Review Board indicated that consideration of this issue required a review of the case law upon which the employer relied during the time period from November, 1941, when the injury occurred, through April, 1948, when the last payment of state compensation was made. The Benefits Review Board specifically focused on this period of time in reliance upon the opinion of the First Circuit Court of Appeals in the case of Jackson v. Justices of the Superior Court,

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one-year statute of limitations in 33 U.S.C. § 913(a) would have barred this claim if filed after December of 1942.

549, F.2d 215, 218 (1st Cir. 1977), cert. denied 430 U.S. 975 (1977) (App. 29a-30a).[5] A brief review of the status of the case law should be helpful in placing the question of retroactivity in context.

Ten years prior to the passage of the orginal Longshoremen's and Harbor Workers' Compensation Act, the Supreme Court held that states were without power to extend their compensation remedies to longshoremen injured on the seaward side of the pier. Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917). This decision left such longshoremen without any compensation remedy while their fellow workers who were employed on the pier itself enjoyed the protection of state compensation statutes. Recognizing that the Jensen decision operated to deprive thousands of workers of compensation benefits, Congress attempted twice to mitigate its effect by legislation expressly allowing state compensation statutes to cover injuries on navigable waters within the reach of state jurisdiction. Each time, however, the Supreme Court held that such a statute unlawfully delegated federal congressional powers to the states. Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920); Washington v. Dawson & Co., 264 U.S. 219 (1924).

In 1922, the Supreme Court itself modified Jensen

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[5]The First Circuit withdrew its "dictum" in the Jackson case in fn. 6 of its opinion in this matter (App. 92).

in Grant Smith-Porter Ship Co. v. Rohde, 257 U.S. 469 (1922). In Rohde, a shipbuilder's employee was injured while at work on new construction, which was afloat on navigable waters. The applicable workmen's compensation statute was exclusive and required notice to the proper state authority if it was desired to pursue a claim within the Act. No such notice was given. A judgment was recovered under a liable in admiralty, which the Supreme Court reversed, ruling that the accident was among those "...certain local matters regulation of which (by the state) would work no material prejudice to the general maritime law." Id. at 477. Thus, Rohde established that a state could validly enact state worker's compensation covering employees engaged in shipbuilding. This case was still good law at the time of Calbeck. Calbeck, supra, at 138 (Stewart, J., dissenting; 4 Larson, Workmens' Compensation Law, § 89.25, 16-168 (1981).

Although the Supreme Court in Rohde restricted the bar of the Jensen case, a large proportion of coastal workers remained outside the range of any non-fault compensation protection. This situation prompted Congress, in 1927, to enact the Longshoremen's & Harbor Workers' Act. The original Act provided that federal compensation benefits would be payable in the event of injury to or death of an employee

> ...only if the disability or death results from an injury occurring on the navigable

> waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not be validly provided by state law.... 33 U.S.C. § 903(a) [emphasis added].

By virtue of the clear language of the statute and the Rohde decision, Donald Simpson did not have any right to benefits under the Longshoremen's and Harbor Workers' Act as of the date of his injury in November of 1941. The Court of Appeals noted that when this situation was changed by Calbeck, the analysis contained in that decision stunned most legal commentators (App. 11a; see fn. 9). A brief review of the case law after 1941 supports that statement.

The employee relied heavily in the Court below on the case of Parker v. Motor Boat Sales, 314 U.S. 244 (1941). The facts of Parker, however, are distinguishable from this case. It involved a shore-based employee who drowned when a boat in which he was riding capsized on a navigable river while testing one of the defendant's outboard motors. The Court decided the case by focusing on the character of the activity at the moment of the injury. Id. at 247. The Court concluded that the plaintiff was clearly engaged in maritime activity and ruled that there was exclusive federal jurisdiction. In reaching this decision, the Court must have held that the State of Virginia could

not have provided a compensation remedy for this injury since it recognized that "Section 3(a) appears to be a subtraction from the scope of the Act." Id. at 249. This conclusion is bolstered by the Court's citing of the Act's purpose "to provide for federal compensation in the area which the specific decision referred to placed beyond the reach of the states." Id. Obviously, after Rohde, it was clear that a state could constitutionally enact a state compensation system covering employees engaged in shipbuilding. Thus, Parker did not foreshadow Calbeck.

Subsequent to Parker, a significant development occurred with the case of Davis v. Department of Labor and Industries of Washington, 317 U.S. 249 (1942). The Supreme Court concluded that the uncertainty and voluminous litigation created by the "maritime but local" and "maritime and national" dichotomy was intolerable. The Court established a "twilight zone,"[6] which could give rise to either state or federal compensation entitlement, depending on the workman's election. The twilight zone arose because courts were facing a difficult, if not impossible, task in attempting to determine whether

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[6]Any possible doubt as to the basis of the Parker decision was resolved in Davis, where the Court explained Parker in terms of the "twilight zone." Calbeck, supra at 138, fn. 8 (Stewart, J. dissenting).

a state could grant protection under its compensation act. Id. at 252. Thus, the twilight zone was adopted to create a presumption of applicability by either act under which an employee elects to receive coverage where it could not be determined with certainty prior to litigation whether the state Act could constitutionally grant benefits.

Creation of the "twilight zone" did not foreshadow the Calbeck decision because it was not the purpose of the Court in Davis to allow the Act to encroach upon areas where a state could clearly enact compensation statutes. In adopting the "twilight zone", the Court remained cognizant of the Section 3(a) limitation. It cited Congress' purpose "to permit state compensation protection wherever possible or whenever possible, by making federal law applicable only 'if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by state law'." Id. at 252-53. Furthermore, Davis was an affirmative state award case. The Supreme Court held that a state could, consistent with the Federal Constitution, issue an award under its state compensation law to the widow of a workman engaged in dismantling an abandoned drawbridge who fell from a barge and drowned in a navigable river. Those facts put the case in the twilight zone because prior law did not establish clearly exclusive state or federal jurisdiction. Thus, the Court concluded

that the state award was proper. The "twilight zone" as described by the Davis Court would not have encompassed Donald Simpson's injury. New ship construction was not in the twilight zone. Rather, Rohde established 20 years earlier that a state clearly had jurisdiction over such an injury.

"Twilight zone" cases subsequent to Davis, did not foreshadow Calbeck's grant of federal jurisdiction under the LHWCH to employees engaged in new shipbuilding.[7] The Supreme Court reaffirmed the validity of the Section 3(a) limitation to federal jurisdiction as recently as three years before Calbeck in the Hahn v. Ross Island Sand & Gravel Co., 358 U.S. 272 (1959). The Court began its decision as follows:

> By its terms, the Longshoremen's and Harbor Workers' Act does not apply 'if recovery for the disability or death through workmen's compensation proceedings may... validly be provided by state law'." Id. [emphasis is original].

The Court held that, when a case fell within the twilight zone, the fact that the employer was covered by the Longshoremen's and Harbor Workers' Act did not prevent a common lawsuit against him as a non-electing employer under the state act. Thus,

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[7] See Bethlehem Steel Co. v. Moores, 335 U.S. 874 (1948); Moores' case, 323 Mass. 162 (1948); Baskin v. Industrial Accident Commission, 338 U.S. 854 (1949); Keiser Co. v. Baskin, 340 U.S. 886 (1950).

Hahn reaffirmed the validity of the Section 3(a) limitation and further the avowed purpose of the Act as cited by the Davis Court "to permit state compensation protection whenever possible." Davis, supra at 252.

Thus, the case law establishes that the Calbeck decision, which established full concurrent federal jurisdiction in areas such as new ship construction which had previously been within the exclusive realm of state law, was not foreshadowed by prior law. See 4 Larson, supra § 89.25 at 16-168[8]

The second factor to be considered under the Chevron Oil analysis is whether the purposes of Calbeck will be furthered or retarded by retroactive application of it to the present case. Both the Benefits Review Board and the Court of Appeals concluded that the purpose of Calbeck was to implement Congress' desire to insure that a compensation remedy existed for all injuries sustained on navigable waters, avoiding uncertainty as to the source, state or federal, of that remedy. The purpose of Calbeck was to eliminate the potential "vacuum" of coverage, in which states refused to pay claims of maritime workers within an

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[8]Larson prefaces his section by discussing the concurrent jurisdiction established by Calbeck as follows: "But once more, the Supreme Court had a surprise in store for the profession." 4 Larson, supra at § 89.25 at 16-165.

area of "local concern." Denying retroactive operation of Calbeck, as the Benefits Review Board noted, would not defeat this purpose, because the employee received compensation under Maine's workers' compensation statute. He was not left without a remedy. The second underlying purpose of Calbeck was to eliminate the uncertainty, litigation, and flux in federal coverage which resulted from the incorporation of the maritime but local doctrine into the Section 3(a) proviso. The Benefits Review Board noted that retroactive application of Calbeck would not eliminate uncertainty and litigation, but rather would have the opposite effect. The Board noted that a flood of litigation would probably result by workers and employers similarly situated to the claimant and the employer in this case. As noted above, these claims would be fraught with evidentiary problems and would be so stale as to be impossible to defend.

Finally, we turn to the third criterion of the Chevron Oil analysis, which is whether retroactive application of the decision will have an unfair inpact on one party which outweighs the benefits to the other party. The Benefits Review Board concluded that applying Calbeck retroactively would result in great inequity to the employer. It is clear that the employer discharged its responsibilities to the claimant under the law as it stood at the time of the injury and for the duration of the state worker's

compensation benefits. Since it appeared that the Longshoremen's Act was inapplicable, the employer had no reason to file a Section 30(a) report during that period to start the running of the statute of limitations. The Benefits Review Board noted that to subject an employer at this late date to unexpected liability for an injury that occurred over 30 years ago would be unjust. The Court of Appeals' Decision to judge the reliance interests of the employer by case law that developed 20 years after the fact is erroneous and is inconsistent with the rule articulated by it in Jackson v. Justices of the Superior Court of Massachusetts, supra, and by the Court of Appeals for the District of Columbia in Wachovia Bank & Trust Co. v. National Student Marketing Corp., supra. The decision of the Court of Appeals warrants plenary review on the issue of the standards to be applied in considering retroactivity, and on the issue of the retroactivity of Calbeck.

II. The Opinion of the Court of Appeals for the First Circuit is Erroneous Insofar as it Conflicts With the Opinion of the Court of Appeals for the Fifth Circuit as Articulated in the Case of Shea v. Texas Employers' Ins. Assoc., 383 F.2d 16 (5th Cir. 1967)

In Shea v. Texas Employers' Ins. Assoc., supra, the Court of Appeals for the Fifth Circuit was confronted with a situation where an employee was

injured while working on board a vessel under construction but afloat in navigable waters. The employee had filed a claim under the state compensation act and recovered benefits pursuant to an award. Subsequently, the employee filed a claim under the Federal Longshoremen's and Harbor Workers' Act. After the state award and prior to any award of benefits under the Longshoremen's Act, the Calbeck decision was issued and established that the case was within the newly-created realm of concurrent jurisdiction for new ship construction. The employer raised as a defense the theory that the employee had made a binding election to recover benefits under the state act and that he was collaterally estopped from arguing in federal court that he did not satisfy the "may not validly be provided" clause in Section 3(a). The district court held that the employee had made a binding election of remedies by litigating to a final judgment in the forum of his choice. The Fifth Circuit sustained the result, but for different reasons:

> The district court placed major reliance on the concept of election of remedies. Whatever application that doctrine might have to a case arising after Calbeck v. Travelers Ins. Co....decided June 4, 1962, it has none to this case for the simple reason that in September of 1961 and February of 1962, when Drake's attorney was insisting that his case fell under the Texas Act, there was no choice.

The lower court decision in Shea, Texas Employers' Ins. Assoc. v. Calbeck, 249 F.Supp. 217, 220 (E.Dist. Texas 1966), affirmed on different grounds, Shea v. Texas Employers' Ins. Assoc., supra, recognized that prior to the 1972 amendments to the Longshoremen's Act, the doctrine of "election of remedies" provided a legitimate defense due to the now defunct Section 3(a) provision providing federal coverage only if recovery for disability or death may not be validly provided through state worker's compensation laws. Newport News Shipbuilding & Dry Dock v. Director, OWCP, 583 F.2d 1273, 1276 (4th Cir. 1978).[9] The Calbeck decision did not defuse that defense when it created a concurrent zone of federal and state jurisdiction for injuries such as the one involved in the instant case. The employer raised the

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[9]Both the First Circuit and the dissenting member of the Benefits Review Board erroneously rejected the election of remedies defense by relying on cases brought under the 1972 amendments. See, e.g., Sunship, Inc. v. Pennsylvania, 447 U.S. 715, 724 (1980). It should be noted that the 1972 amendments specifically deleted the Section 3(a) proviso upon which the election of remedies doctrine was based. The Court in Calbeck did not explicitly reject the election of remedies doctrine, they simply held that the mere acceptance of benefits in and of itself did not constitute a binding election. In this case, the employee did not merely accept voluntary benefits. Rather, he proceeded through litigation to an award and judgment which was satisfied.

election of remedies defense at all stages of this litigation and continues to assert it here, contending that the Court of Appeals erroneously rejected that defense. In evaluating the language in Calbeck, it should be noted that the Supreme Court stated, "and we agree that the circumstances do not support a finding of a binding election to look solely to state law for recovery." Calbeck, supra at 131. That statement reveals the Court's interest to retain the "election of remedies" doctrine under appropriate circumstances in the pre-1972 statute.

In a post-Calbeck case, Windrem v. Bethlehem Steel Corp., 293 F.Supp. 1 (D.N.J. 1968), the Court found circumstances constituting a binding "election of remedies" by the claimant. Mere acceptance of payments voluntarily made by an employer under state compensation law does not constitute a binding election. Id. at 5. However, when the injured employee in a "twilight zone" case prosecutes his claim to judgment under a valid state compensation law and liability then established is fully discharged by the employer, those circumstances constitute a binding election." Id. at 5-6. (See also Peter v. Agrien, 325 F.Supp. 1361, 1366 (Id. Penn. 1971), aff'd., 463 F.2d 252 (3rd. Cir. 1972); Holland v. Harrison Bros. Dry Dock & Repair Yards, 306 F.2d 369, 373 (5th Cir. 1962). In Windrem, the employee was represented by counsel and proceeded under the state

compensation statute. An award was made in his favor and the employer discharged his duty under the award. The Court held that the employee made a binding election of remedies which barred the claim under the federal statute. This case, similarly to Windrem, is not a case where there was a mere acceptance of voluntary payments under state law. Rather, the employee is represented by counsel and he actively enforced his rights under the state act and accepted satisfaction of final judgment.

If, arguendo, the Court of Appeals for the First Circuit is correct that Calbeck should be applied retroactively, then the Courts in Windrem and the lower court in Shea correctly applied the election of remedies doctrine barring claims under circumstances identical in all material respects with the facts presented at the case at bar.

The Fifth Circuit's decision in Shea, supra, supports the petitioner's argument that Calbeck was a radical departure from pre-existing law and should not be retroactively applied. If that view is erroneous, the proviso contained in Section 3(a) of the LHWCA, together with the Windrem decision and the lower court opinion in Shea establish that Donald Simpson made a binding "election of remedies" thereby precluding y resort to the Longshoremen's Act. These substantial issues of federal law, presenting conflicts among the Circuits regarding construction of federal statute and application of a case of the Supreme Court

deserve plenary review.

III. Conclusion

The Benefits Review Board characterized this case as one of first impression involving issues of far reaching import. It predicted that the result reached by the Court of Appeals below would produce a flood of litigation of stale claims. The Court of Appeals Decision below conflicts with the opinion of the Court of Appeals of the District of Columbia with regard to the standards to be applied in considering the question of retroactivity, and with the Court of Appeals of the Fifth Circuit with regard to the merits of the retroactivity issue. The petitioners urge this Court to reverse the result below, and to rule that this claim for benefits under the Longshoremen's and Harbor Workers' Compensation Act is barred by 33 U.S.C. § 903(a). Alternatively, the petitioners urge the Court to rule that the employee made a binding election of a state worker's compensation remedy under the statute as it existed at the time of his injury.

Respectfully submitted,
NORMAN & HANSON

By: Stephen Hessert
Counsel for the
Petitioners

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APPENDIX A

United States Court of Appeals
For the First Circuit

No. 81-1455

DONALD J. SIMPSON,

PETITIONER,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

BATH IRON WORKS CORPORATION,

and

AMERICAN MUTUAL LIABILITY INSURANCE COMPANY,

RESPONDENTS.

ON PETITION FOR REVIEW OF A FINAL ORDER OF THE BENEFITS REVIEW BOARD

Before

COFFIN, *Chief Judge*,

ALDRICH and BREYER, *Circuit Judges*.

Jonathan W. Reitman, with whom *McTeague, Higbee & Tucker* was on brief, for petitioner.

Stephen Hessert, with whom *Norman & Hanson* was on brief, for respondents.

June 23, 1982

COFFIN, *Chief Judge*. This case requires us to determine whether the Supreme Court's decision in *Calbeck* v. *Travelers Insurance Co.*, 370 U.S. 114 (1962), which clarified the jurisdictional scope of the Longshoremen's and Harbor Workers' Compensation Act of 1927, should be applied to workers' injuries that antedated the decision.

I. Background

On November 21, 1941, Donald Simpson was working as a welder on board a vessel under construction on a marine railway at the Bath Iron Works shipyard. He fell approximately fifty feet from the deck of the vessel, landing on his back on a set of pipes on the marine railway. He was rendered a paraplegic and has been confined to a wheelchair ever since. The employer (BIW) knew of the injury but never filed a First Report of Injury under the Longshoremen's Act. Simpson sought and received $6,000 from the employer under the provisions of the State of Maine Workers' Compensation Act between December 18, 1941, and April 8, 1948. *See Simpson's Case*, 144 Me. 162 (1949). On March 22, 1977, Simpson filed a claim for benefits under the federal Act. He seeks $1,500 (the difference between the $6,000 recovered under the Maine Act and the $7,500 that was authorized under the federal Act in 1941) plus reimbursement for thirty-six years' worth of medical expenses (available under the federal but not the state Act). The claim was not barred by the Act's statute of limitations, because of the employer's failure to file a First Report of Injury. 33 U.S.C. §§ 913(a), 930(f).

In proceedings within the Department of Labor, the employer posed a series of jurisdictional challenges to Simpson's claim. It is clear that Simpson's injury fell within the coverage of the Act's jurisdictional rule, 33 U.S.C. § 903(a) (Section 3(a) of the Act) as it was interpreted in *Calbeck, supra.*[1] BIW argued that *Calbeck*'s interpretation should not apply retroactively to Simpson's injury; that the claim was barred by the collateral estoppel theory of *Shea* v. *Texas Employer's Insurance Assoc.*, 383 F.2d 16 (5th Cir. 1967), as well as the doctrines of election of remedies, res judicata, and laches; and that Simpson's injury did not meet the federal Act's situs requirement since he fell from the vessel onto land.

[1] In 1972, Section 3(a) was amended. The parties agree that those amendments had no effect on Simpson's already existing claim.

The Administrative Law Judge dismissed Simpson's claim on the basis of the employer's second argument, holding *Shea, supra,* controlling. The Benefits Review Board disagreed and held that *Shea* was inconsistent with *Calbeck.* Nevertheless, the Board affirmed the dismissal of Simpson's claim. In a split decision, Administrative Appeals Judge Miller dissenting, it reasoned that *Calbeck*'s analysis of Section 3(a) was not to be applied retroactively.

We have jurisdiction to review the Board's decision, pursuant to 33 U.S.C. § 921(c). The Director of the Office of Workers' Compensation Programs has, as a party-respondent, *see Shahady* v. *Atlas Tile & Marble Co.*, 673 F.2d 479 (D.C. Cir. 1982), filed a brief in support of the petitioner, urging reversal of the Board.

II. The Retroactivity of *Calbeck*

A. The *Calbeck* Holding

Calbeck v. *Travelers Insurance Co.*, 370 U.S. 114 (1962), considered two cases, each arising out of facts indistinguishable from those before us here. In each case, a worker had been injured while laboring aboard a new vessel that was still under construction, but already afloat on navigable waters. The insurance company in *Calbeck* had prevailed before the Fifth Circuit Court of Appeals, *Travelers Ins. Co.* v. *Calbeck*, 293 F.2d 52 (5th Cir. 1961); *Avondale Shipyards, Inc.* v. *Donovan*, 293 F.2d 51 (5th Cir. 1961) on the basis of the following syllogism:

> 1. Section 3(a) of the Act declared that compensation was available under federal law only if "recovery ... through workmen's compensation proceedings may not validly be provided by state law."[2] Federal and state jurisdiction were therefore mutually exclusive.

[2] The relevant text of 33 U.S.C. § 903(a) before the 1972 amendments was:

2. A line of cases starting with *Grant Smith-Parke Ship Co.* v. *Rohde*, 257 U.S. 469 (1922), had established the so-called "maritime-but-local" or "local concern" doctrine. According to this doctrine, when an employee performed tasks of "local concern", such as constructing a new vessel on navigable waters, a state law *could* validly provide workers' compensation in a maritime context.

3. Thus, the Longshoremen's Act did not permit federal compensation to workers whose situations were covered by the maritime-but-local doctrine.

(Hereafter we will call this argument "the *Rohde*-3(a) syllogism".)

Despite the neatness of the *Rohde*-3(a) syllogism, the Supreme Court reversed. The Court made several points in its meticulous analysis of § 3(a)'s legislative history. Earlier drafts of section 3(a) had explicitly incorporated the "local concern" doctrine. A House Committee had eliminated the language completely; a Senate Committee had responded to employer complaints about the language by replacing it with the "may not validly be provided by State law" language. The Senate language was adopted, not to incorporate "local concern" obliquely, but rather to eliminate a parliamentary obstacle on an unrelated issue (the exclusion of seamen from coverage). *Calbeck, supra*, 370 U.S. at 122-24 & n.13.

In addition, the purpose of the Act, as stated in the Senate Report, S. Rep. No. 973, 69th Cong., 1st Sess., at 16, was to provide certain compensation for a class of employees who had been denied the certainty offered by state compensation statutes. The Senate Report named three Supreme Court

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"(a) Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any drydock) and if recovery for the disability or death through workmens compensation proceedings may not validly be provided by State law."

cases that had created the need for such an Act: *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205 (1917); *Knickerbocker Ice Co.* v. *Stewart*, 253 U.S. 149 (1920); and *Washington* v. *Dawson & Co.*, 264 U.S. 219 (1924). (*Jensen* had declared unconstitutional New York's efforts to apply its state compensation statute to an injury sustained on a gangplank between a vessel and a wharf; *Stewart* and *Washington* had struck down federal statutes attempting to authorize the states to use their own compensation statutes in such cases.) This Senatorial statement of purpose makes no mention of *Rohde* or the local concern doctrine. *See Calbeck, supra*, 370 U.S. at 126 n.14. Moreover, the *Rohde*-3(a) syllogism would undermine the stated goal. It would eliminate certainty because "the contours of the 'local concern' concept were and have remained necessarily vague." *Id.* at 124. It would perpetuate the risk that some maritime employees would be covered by neither federal nor state laws, wherever a state chose not to push its coverage to the Constitutional limit. *Id.* at 125. And it would make "federal coverage expand and recede in harness with developments in constitutional interpretation as to the scope of state power, [meaning] that every litigation raising an issue of federal coverage would raise an issue of constitutional dimension, with all that that implies; and that each and every award of federal compensation would equally be a constitutionally premised denial of state competence in a like situation." *Id.* at 126.[3]

B. The Benefits Review Board Decision

In its opinion below, the Benefits Review Board concluded that *Calbeck*'s interpretation should not be applied to all claims arising out of injuries since 1927. It anchored its

[3] Justice Stewart and Justice Harlan dissented. 370 U.S. at 132-38. They dubbed the majority approach an "exercise in judicial legerdemain", arguing that the clear language of the statute supported the *Rohde*-3(a) syllogism. They offered an alternative explanation for the legislative history, and they accused the majority of departing from precedent.

analysis in the following language from *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106-07 (1971):

> "In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, *see, e.g., Hanover Shoe* v. *United Shoe Machinery Corp.*, [392 U.S. 481,] 496, or by deciding an issue of first impression whose resolution was not clearly foreshadowed, *see, e.g., Allen* v. *State Board of Elections*, [393 U.S. 544,] 572. Second, it has been stressed that 'we must ... weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.' *Linkletter* v. *Walker*, [381 U.S. 618,] 629. Finally, we have weighed the inequity imposed by retroactive application for, '[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity.' *Cipriano* v. *City of Houma*, [395 U.S. 701,] 706."

The Board majority, impervious to the protestations of its own dissenting number, embraced the views of the *Calbeck* dissent to support its belief that *Calbeck* established a new principle of law. It then declared that *Calbeck*'s purposes would not be promoted by applying it to Simpson's claim, but purported to reserve judgment on whether those purposes might be promoted by retroactive application to other, different claims. Finally, it concluded that the balance of equities favored BIW over Simpson. It held that the controversy was governed by "the law in effect during the time when claimant's state claim was pending" — "the maritime but local rule, at that time incorporated by Section 3(a)". Since we

disagree with the manner in which the board applied *Chevron Oil* to this case, we must vacate its judgment.

C. Preliminary Observations on Retroactivity

A fundamental perspective that must inform our analysis is that the retroactive applicability of judicial decisions of federal courts is the rule, not the exception. This century[4] has seen the Supreme Court establish that both state courts, *see Great Northern Railway* v. *Sunburst Co.*, 287 U.S. 358 (1927), and federal courts, *see Linkletter* v. *Walker*, 381 U.S. 618 (1965), may legitimately conclude that justice requires a decision to be applied non-retroactively. But, at least in the federal courts, the strong presumption has remained in favor of retroactivity. *Robinson* v. *Neil*, 409 U.S. 505, 507-08 (1973); *Miro Martinez* v. *Compania Transatlantica Espanola*, 643 F.2d 897 (1st Cir. 1981). This presumption follows in part from the fact that every federal decision applies "retroactively" to a set of facts that has already taken place.[5] The presumption promotes uniform treatment of litigants, since the reasons that lead the court to make such a "retroactive" decision should apply with equal force to other similarly situated litigants, no matter when their cases arise. Most court-made

[4] The early history of the theory of prospective judicial decisions is reviewed in detail in *Linkletter* v. *Walker*, 381 U.S. 618 (1965). The associated theoretical problems have long been a source of interest to scholarly commentators. *See, e.g.*, Mishkin, *Foreword: The High Court, The Great Writ, and the Due Process of Time and Law*, 79 Harv. L. Rev. 56, 58-69 (1965); Schaefer, *The Control of 'Sunbrusts': Techniques of Prospective Overruling*, 42 N.Y.U.L. Rev. 631 (1967); R. Keeton, *Venturing To Do Justice* 25-53 (1969); Beytagh, *Ten Years of Non-retroactivity: A Critique and a Proposal*, 61 Va. L. Rev. 1557 (1975); R. Aldisert, *The Judicial Process* 877-938 (1976).

[5] In theory, at least, this is a result of Article III's requirement that the federal courts resolve only cases and controversies. *See Stovall* v. *Denno*, 388 U.S. 293, 301 (1967). Statements of principle that do not apply to the case that spawns them are technically dictum, even though they may in practice be accorded precedential force. *Cf. Morrissey* v. *Brewer*, 408 U.S. 471, 490 (1972).

law is interstitial, constrained by previously enacted principles of positive constitutional and statutory law, and merely clarifies points that were previously open to debate. It is applied retroactively, since that is usually the fairest, least arbitrary way to proceed. *Cf. Bradley* v. *Richmond School Board*, 416 U.S. 696 (1974) (federal statute modified between trial decision and appellate decision; new version must control); *Vandenbark* v. *Owens-Illinois Glass Co.*, 311 U.S. 538 (1941) (state Supreme Court reversed prior holdings between federal trial and federal appeal; new interpretation must control).

Yet sometimes retroactivity would be excessively unsettling. At times a decision not only makes law, it effects a *volte-face*. Even in such cases, retroactivity would still provide for the most uniform application of the new, correct legal standards, but that interest in uniformity is outweighed by the need to protect justifiable reliance on a contrary, seemingly authoritative view of the law. Thus, the Supreme Court has given only prospective effect (other than application to the case before it) to some cases that overruled prior doctrine. *E.g., Daniel* v. *Louisiana*, 420 U.S. 31 (1975); *Mackey* v. *United States*, 401 U.S. 667 (1971); *Williams* v. *United States*, 401 U.S. 646 (1971); *Fuller* v. *Alaska*, 393 U.S. 80 (1968); *Johnson* v. *New Jersey*, 384 U.S. 719 (1966); *Linkletter, supra*. And, in the area of criminal procedure, where society through its law-enforcement agents depends daily on whatever the established rules of legitimate police conduct may be, the Court has given prospective effect to decisions creating new rules unrelated to the truth-finding process. *E.g., United States* v. *Peltier*, 422 U.S. 531 (1975); *Hill* v. *California*, 401 U.S. 797 (1971); *Williams, supra; Jenkins* v. *Delaware*, 395 U.S. 213 (1969); *Desist* v. *United States*, 394 U.S. 244 (1969); *Fuller, supra; Stovall* v. *Denno*, 388 U.S. 293 (1967); *Johnson, supra; Linkletter, supra*. *Chevron Oil*'s factors are intended to help courts bring this form of analysis to bear in other legal areas. The factors are not discrete, disem-

bodied tests, but rather offer three perspectives on the central question of retroactivity: was reliance on a contrary rule so justified and the frustration of expectation so detrimental as to require deviation from the traditional presumption of retroactivity?

Before applying *Chevron Oil*'s factors to this case, we address a question on which the Supreme Court has not yet given explicit guidance: should the factors (and the issue of reliance) be analyzed in light of the particular litigants in a given case, or in light of general patterns throughout society? We address this question, first, because respondent BIW contends that *Calbeck* should not be applied retroactively in this case for the reason that Simpson was not denied a remedy but in fact received all that the state compensation system offered. We address it for the additional reason that language in *Chevron Oil* arguably supports a highly particularistic, if not atomistic, application of retroactivity, such a reading having been adopted in the recent case, *Wachovia Bank and Trust Co.* v. *National Student Marketing Corp.*, 650 F.2d 342 (D.C. Cir. 1980). We believe that the more general perspective should control.

The question is whether a new decision's retroactivity is decided just once, or is decided anew in each case raising the issue. We know of no cases that have been applied prospectively to some litigants and retroactively to others. This is undoubtedly because such a rule would be unworkable. An individualized inquiry into reliance in each case would force courts to spend energy in each case determining how the law on an issue appeared at any given moment in history. It would also require detailed investigation into the facts bearing on the quality of particular parties' reliance. Thus, once the *Chevron Oil* analysis is applied to a particular decision of law, the result — whether "retroactive" or "prospective" — should govern all subsequent cases.[6] Such, of course, was the

[6] We therefore must withdraw our dictum in *Jackson* v. *Justices of the Supreme Court of Mass.*, 549 F.2d 215, 218 n.2 (1st Cir. 1977), where we implied that our holding of non-retroactivity might be limited to certain would-be beneficiaries of the new rule.

result when, for example, the ruling in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), was made retroactive, *Johnson* v. *New Jersey*, 384 U.S. 719, 733-34 (1966); courts were not expected to search whether, in fact, suspects in custody had lawyers, or wanted to consult them, and whether, in fact, police officers had relied on cases such as *People* v. *Hargraves*, 31 Ill. 2d 375 (1964) that had narrowly construed *Escobedo* v. *Illinois*, 378 U.S. 478 (1964).

Of course, that conclusion must influence the manner in which the inquiry is conducted; a general decision on retroactivity should not be controlled by specific, possibly aberrational facts. Although the circumstances of particular litigants may be important when they typify general patterns of reliance,[7] case facts per se are not the relevant data in applying *Chevron Oil*. In terms of the values described above, the presumption of retroactivity (and the interest in uniformity) is outweighed when there are sufficient indications of justifiable *societal* reliance on a different rule. We now apply that analysis to *Calbeck*.

D. *Chevron Oil*'s First Factor

Chevron Oil's first factor focuses on how much a decision changes the law. To overcome the presumption of retroactivity, the decision must establish "a new principle of law." 404 U.S. at 106. It can do so "either by overruling clear past precedent on which litigants may have relied ... or by deciding an issue of first impression whose resolution was not clearly foreshadowed." *Id.* This requires an inquiry into the

[7] This has been the case in several Supreme Court decisions on retroactivity. *E.g.*, *Chevron Oil* v. *Huson*, 404 U.S. 97 (1971); *Allen* v. *State Board of Elections*, 393 U.S. 544, 572 (1969); *England* v. *State Board of Medical Examiners*, 375 U.S. 411 (1964). In each case the Court buttressed its analysis by making reference to the facts of the parties before it and then phrased its finding on retroactivity in general terms.

state of the law when the new decision was handed down.[8] As BIW concedes, *Calbeck* was not an overruling decision. The opinion was explicit in reconciling its conclusion with prior Supreme Court decisions. *Calbeck, supra,* 370 U.S. at 127. BIW contends, however, and the Benefits Review Board held, that *Calbeck* "decid[ed] an issue of first impression" in a surprising manner that "was not clearly foreshadowed."

We note at the outset the difficulty of arguing that a decision that does nothing but interpret a statute in light of its legislative history was not "clearly foreshadowed". Nevertheless, we will not blink the fact that *Calbeck*'s line of analysis stunned most legal commentators;[9] that consideration alone leads us to assume, for purposes of careful analysis, that any "threshold" aspect of *Chevron Oil*'s first factor was met.[10] Yet this is not a particularly significant

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[8] In *Wachovia Bank and Trust Co.* v. *National Student Marketing Corp.*, 650 F.2d 342 (D.C. Cir. 1980), the court concluded that one should analyze the state of the law at the time a particular claim arose rather than at the time of the lawmaking decision. We decline to follow *Wachovia* since it implicitly assumes that *Chevron Oil*'s factors should be analyzed in light of particular litigants' reliance interests. *See* three previous paragraphs in text *supra.*

[9] For commentators surprised by the breadth of *Calbeck, see* G. Gilmore & C. Black, The Law of Admiralty (2d ed. 1976); H. Baer, Admiralty Law of the Supreme Court § 6-4 (2d ed. 1969); Note, 17 Southwestern L.J. 345, 350 (1963); *The Supreme Court, 1961 Term,* 76 Harv. L. Rev. 54, 95-98 (1962); Note, 15 S. Cal. L. Rev. 982 (1963). *But see* Note, 1963 Duke L.J. 327, 331 ("Calbeck was forecast by past decisions"); Note, 35 Tulane L. Rev. 841 (1962) (suggesting that the Fifth Circuit's opinion in *Calbeck* was inconsistent with the legislative history); Note, 50 Cal. L. Rev. 342, 345 (1962) (suggesting that the Fifth Circuit's opinion in *Calbeck* was inconsistent with *Davis*).

It bears mention that *Calbeck* was not a case where the Court based its decision on a new theory not imagined by the parties. Solicitor General Cox and Assistant Attorney General Orrick had presented the argument in full detail in their brief for appellant.

[10] It has frequently been said that an issue of retroactivity "is not even presented" unless a decision satisfies a threshold condition of novelty. This condition has usually been termed a "sharp break" requirement. *See, e.g., Hanover Shoe, Inc.* v. *United States*

step. Almost every plenary decision of the Supreme Court resolves an issue of first impression, narrowly defined, and hardly any is *clearly* foreshadowed. Analysis of *Chevron Oil*'s first factor requires more. It remains for us to determine whether it weighs heavily, moderately, or only slightly against retroactivity. The question is whether preexisting doctrine was so clear as to be likely to induce extensive commitments based on a particular different understanding of the law. Our review of the history leads us to conclude that the legal waters were so muddy before 1962 that it would have been quite imprudent to rely on the *Rohde*-3(a) syllogism.

We note first that the language of § 3(a) was too awkward to inspire much reliance. Many commentators did read it to imply that *Rohde*'s maritime-but-local rule had been incorporated in section 3(a). *E.g.*, G. Gilmore & C. Black, The Law of Admiralty 346 (1957). But that reading was not problem-free, and the *Calbeck* construction was a linguistically defensible alternative.[11] Additionally, the legislative history cut sharply

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Machinery Corp., 392 U.S. 481, 499 (1968). *See also United States* v. *Peltier*, 422 U.S. 531, 544 & n.1 (1974) (Brennan, J., dissenting) (suggesting that the condition has been abandoned); *Milton* v. *Wainwright*, 407 U.S. 371, 381 n.2 (1972) (Stewart, J., dissenting). We see no advantage in attempting to specify where on the continuum of sharpness that threshold might be, if it still exists. Instead we consider the manner in which *Calbeck* changed the law as one of several factors bearing on the justification for reliance on the *Rohde*-3(a) syllogism.

[11] The relevant statutory language is, "*if recovery ... may not validly be provided by State law.*" The *Rohde*-3(a) syllogism interprets the word "may" in a constitutional sense, reading the statute to mean:

> "If it would be unconstitutional for state law to provide compensation, then there is federal jurisdiction."

As has been noted in D. Robertson, Admiralty and Federalism 311-18 (1970), this interpretation makes the statutory word "validly" quite superfluous. An alternative interpretation, consistent with *Calbeck*, would interpret the word "may" in a different sense, reading the statute to mean:

against the *Rohde*-3(a) syllogism, *see Calbeck, supra*, 370 U.S. at 122-26; Note, Tulane L. Rev. 843, 845-56 & nn.10-12.

Nor can it be said that Supreme Court case law would have induced widespread reliance on the syllogism. After the passage of the Act, the Court continued to develop the maritime-but-local doctrine as a limitation on state jurisdiction, but it never held that the doctrine affected *federal* jurisdiction under § 3(a). The only conceivable Supreme Court support for such an inference came in a passing remark in *Crowell* v. *Benson*, 285 U.S. 22, 41 & n.3 (1932). Yet holdings in subsequent cases made it clear that the maritime-but-local doctrine would not be used to oust federal jurisdiction. For example, *Parker* v. *Motor Boat Sales, Inc.*, 314 U.S. 244, *rev'g*, 116 F.2d 789 (4th Cir. 1941), set forth a paradigmatic maritime-but-local fact situation: a janitor in a boat store "had been repeatedly and specifically cautioned and instructed that he was not to get on boats, ride in boats, or perform any services on navigable waters." 116 F.2d at 791. After helping a customer mount an outboard motor, the janitor went out for a ride and drowned. The court of appeals held the federal claim barred by *Rohde* and § 3(a). The Supreme Court reversed, saying that, whether or not maritime-but-local governed these facts, Congress had intended in § 3(a) to provide compensation in the area that certain "specific decisions" — *Jensen, Knickerbocker*, and *Dawson* — had placed beyond the states' reach. 314 U.S. at 248. And the following year, in *Davis* v. *Department of Labor and Industries*, 317 U.S. 249 (1942), the Court declared the existence of a "twilight zone" of injuries that could be compensated under either state or federal law. This

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> "If it is possible that State law might fail to provide constitutionally valid compensation, then there is federal jurisdiction."

Id. Although we do not suggest that we find this latter interpretation more natural in the absence of any legislative history, we are content to note that — on a purely linguistic level — the statute is not unambiguous.

holding was clearly incompatible with the first step in the *Rohde*-3(a) syllogism.

Nor was there much lower-court precedent that would have justified an employer in relying on the *Rohde*-3(a) syllogism until 1962. The only glimmer of encouragement for such a view came in the form of dictum. *Royal Indemnity Co.* v. *Puerto Rico Cement Co.*, 142 F.2d 237 (1st Cir. 1944), *cert. denied*, 323 U.S. 756 (1944), held § 3(a) inapplicable because the case was covered by the Defense Bases Act, but suggested that if § 3(a) had been applicable, it would be construed as limiting federal jurisdiction under the Act to areas in which federal power was exclusive. *Id.* at 238-39. Similar dictum was found in *Union Oil Co.* v. *Pillsbury*, 63 F.2d 925 (9th Cir. 1933).

But although such dicta existed, "[d]eviant rulings by circuit courts of appeals, particularly in apparent dictum, cannot generally provide the 'justified reliance' necessary to warrant withholding retroactive application of a decision construing a statute as Congress intended it." *United States* v. *Estate of Donnelly*, 397 U.S. 286, 295 (1970). Moreover, the holdings in cases that turned on the issue were uniformly to the contrary. In *Continental Casualty Co.* v. *Lawson*, 64 F.2d 802, 805 (5th Cir. 1933), the Fifth Circuit held that "Congress intended to exercise to the fullest extent all the power and jurisdiction it had over the subject matter." And in *DeBardeleben Coal Corp.* v. *Henderson*, 142 F.2d 481, 483-84 (5th Cir. 1944), the same court waxed fervent:

> "In the application of the act, ... the broadest ground it permits of should be taken.... [T]he Federal Compensation Law now in effect, the judicial tergiversations which went on before its passage no longer have point. This is what we held in the Lawson case, what the Supreme Court held in the Parker case, supra. We adhere to that holding. The judgment was right. It is affirmed."

This was precisely the *Calbeck* analysis, eighteen years before *Calbeck*.[12] Similarly in *Travelers Ins. Co.* v. *McManigal*, 139 F.2d 949 (4th Cir. 1944), the court held that, in interpreting § 3(a) of the federal act, "there is no room for the application of the rule announced in cases of the *Rohde* class." *Id.* at 953. *See also Travelers Ins. Co.* v. *Branham*, 136 F.2d 873 (4th Cir. 1943).

Thus, *Chevron Oil*'s first factor does nothing to rebut *Calbeck*'s presumptive retroactivity. Indeed, it supports it.

E. *Chevron Oil*'s Second Factor

Chevron Oil's second factor draws us to consider whether retroactivity would be inconsistent with the purposes of *Calbeck*. The case sought to implement Congress's desire that the Longshoremen's Act provide the federal scheme of compensation to a certain, clearly identified class of workers. Retroactive application would provide that certainty equally to all employees injured since the passage of the Act. Nonretroactivity would leave workers injured before 1962 without the certain remedy that the 1927 Congress supposedly intended to provide. Thus, retroactivity would be consistent with *Calbeck*'s purpose, and nonretroactivity inconsistent.

In its opinion below, the Benefits Review Board majority found nonretroactivity wholly consistent with *Calbeck*'s purposes. It reasoned, first, that *Calbeck* could be given limited retroactive effect, applying only to litigants who (unlike Simpson) had never accepted benefits under a state scheme. Second, it suggested that general retroactivity would loose "a flood of litigation" on the courts, thereby promoting the uncertainty and lawsuits that *Calbeck* sought to eliminate.

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[12] Indeed, the Fifth Circuit opinion that was reversed by the Supreme Court in *Calbeck* had sought to overrule *DeBardeleben* and *Lawson*. *See Travelers Ins. Co.* v. *Calbeck*, *supra*, 293 F.2d at 58.

As we have noted above, it is error as a general proposition to assume that a single rule can be applied retroactively as to some litigants but not as to others. This point has special strength in analyzing *Calbeck*. In *Calbeck* itself relief was unquestionably available to the two workers under state law, and benefits had in fact been paid under state law in one of the two cases. The Court nevertheless reasoned broadly, and supported its construction of section 3(a) by noting that in other, more typical cases, such a remedy might not be assured. 370 U.S. at 125. It would be peculiar indeed if the analysis of retroactivity should be bound by particular case facts when the underlying decision was not so constrained.

Similarly, we are unmoved by the Board's fear of a flood of litigation. The majority expressed its fear as a bald assertion, unsupported by evidence or expert predictions. Moreover, that fear is illogical. At the time *Calbeck* was decided, the theory of federal nonretroactivity was still inchoate. Any flood that the decision might have stimulated would certainly have come early in the 1960's, not in the 1980's.

F. *Chevron Oil*'s Third Factor

Chevron Oil's third factor requires us to consider the equities of retroactivity. Claimants in Simpson's position assert that they should receive the benefits that the 1927 Congress said they were entitled to. The interests of employers in BIW's position are those of reliance — allegedly an employer of a *Rohde*-type employee would have chosen to forgo insurance against liability under the federal act. The equitable strength of these reliance interests varies with both their justification and their extent. As we have seen, an employer would have had only slight justification for relying on the *Rohde*-3(a) syllogism.

Furthermore, the extent of that reliance — though not easily gauged — does not seem to have been substantial. One possible approach to measuring the extent of reliance might

be to determine the potential gross liability that employers in BIW's position assumed by not carrying federal liability insurance before *Calbeck*. The record contains no evidence of how many employers forwent federal liability insurance because of the *Rohde*-3(a) syllogism, how many of those employers' workers would actually have been declared maritime-but-local, how many of those employees actually became injured, and how much the injured employees were entitled to receive in federal benefits. Given the ceiling on federal compensation[13] (even before subtracting any benefits already recovered under state law), we doubt the final figure would be very large.

An alternate approach to measuring the extent of reliance might be to compute the amount of money employers in BIW's position would have saved by limiting their insurance coverage to state liability. The record again gives no guidance, but a widely cited secondary source reports that, at the time *Calbeck* was decided, there was "a standard workmen's compensation policy used by all carriers on a nationwide basis, which may be extended by endorsements, to cover operations subject to the Longshoremen's Act . . . [T]he only extra expense to the employer for coverage under both acts

[13] Between 1927 and 1948, compensation under the federal act was limited to $7500. Longshoremen's and Harbor Workers' Compensation Act of 1927, ch. 509, § 14(m), 44 Stat. 1432. Between 1948 and 1956, the ceiling was removed for cases of permanent total disability or death, and was raised to $11,000 (sometimes $10,000) for other cases. Act of June 24, 1948, ch. 623, § 5, 62 Stat. 603. Between 1956 and 1961, the ceiling was raised to $17,280. Act of July 26, 1956, ch. 735, § 5, 70 Stat. 655. Between 1961 and *Calbeck*'s decision in 1962, the ceiling was raised to $24,000. Act of July 14, 1961, P.L. 87-87, § 3, 75 Stat. 203.

Of course "compensation" does not encompass reimbursement for medical expenses. Thus, § 14(m)'s ceiling only limited employers' potential retroactive liability for the other (less easily measured) aspects of maritime-but-local workers' damages. We mention the ceiling only as one factor supporting our conclusion that the employers' potential gross liability is not so extraordinary as to deserve special weight.

is a small fee that the carriers charge for the endorsement to the second act." Note, 50 Cal. L. Rev. 342, 347 (1962). *Accord*, Comment, NACCA L. J. 200, 203, 206 (1964); Gardner, *Remedies for Personal Injuries to Seamen, Railroadmen, and Longshoremen*, 71 Harv. L. Rev. 438, 449-50 & n.34 (1958). No matter how one approaches the measurement of employer reliance, we have no reason to think it was particularly extensive.

We think guidance in balancing the equities of employers and employees may be taken from *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976). That case upheld the retroactive application of the Black Lung Benefits Act of 1972. The statute required coal mine operators to compensate former employees who terminated their work in the industry before the Act was passed and who developed pneumoconiosis after leaving their jobs. Even though it was possible "that the Operators may not have known of the danger of their employees' contracting pneumoconiosis, and that even if they did know of the danger their conduct may have been taken in reliance upon the current state of the law, which imposed no liability on them for disabling pneumoconiosis", the statute was upheld in order "to spread the costs of the employees' disabilities to those who had profited from the fruits of their labor — the operators and the coal consumers." *Id.* at 17-18. Even though the presumptive validity of a statute may be greater than the presumptive retroactivity of a judicial decision, *Usery* is relevant here as a clear evaluation of the balance of equities between disabled employees and employers who claim reliance on prior law.

When the situation is analyzed in light of *Chevron Oil*'s three factors, we are not persuaded that *Calbeck* was decided in the face of such widespread justifiable reliance on the *Rohde*-3(a) syllogism as to overcome the general presumption of retroactivity. *Calbeck*'s holding should therefore govern all decisions under the 1927 Act.

III. Other Asserted Grounds for Affirmance

The respondent BIW urges that even if *Calbeck* was retroactive, Simpson's claim should have been dismissed in accord with the Fifth Circuit's holding in *Shea* v. *Texas Employers Insurance Assoc.*, 383 F.2d 16 (5th Cir. 1967). This argument was accepted by the Administrative Law Judge, but rejected by the Benefits Review Board.

In *Shea*, the Fifth Circuit held that a person who had already recovered through state court litigation was collaterally estopped from arguing in federal court that he satisfied the "may not validly be provided" clause in § 3(a). The court understood *Calbeck* to be a statement that an accident sustained on navigable waters was presumptively beyond the scope of valid state coverage, but where a state court decision explicitly rebutted that presumption, collateral estoppel would not allow it to be revived later in federal court. Thus, the Fifth Circuit would apply *Calbeck* only in the absence of state litigation.

We agree with the Benefits Review Board that *Shea* misapprehended the import of *Calbeck*. *Calbeck* was not just another "twilight zone" case establishing a presumption of federal jurisdiction. Rather, *Calbeck* held that Congress had actually (albeit inartfully) authorized "federal compensation for all injuries to employees on navigable waters." 370 U.S. at 120. That authorization was to be accepted regardless of what a particular claimant had been able to recover under state law. Thus, although a state court opinion could collaterally estop the litigant from debating the scope of state court jurisdiction, the question of state court jurisdiction was simply not relevant in cases under the federal act. *See generally* 4 Larson's Workmen's Compensation Law § 89.53(b) (1981).

The respondent's remaining arguments were not passed upon by the Benefits Review Board below. We believe that its arguments based upon the situs of the injury and the theories

of election of remedies and res judicata are without merit. The argument that Simpson's injury is not covered because he fell onto the ground is inconsistent with the reasoning in *Minnie* v. *Port Huron Terminal Co.*, 295 U.S. 647 (1935). The election of remedies argument was explicitly rejected by the Supreme Court in *Calbeck, supra*, 370 U.S. at 131-32, and again in *Sun Ship, Inc.* v. *Pennsylvania*, 447 U.S. 715, 724 (1980). And any res judicata argument (to the extent distinguishable from *Shea*'s collateral estoppel argument) is refuted by the fact that claims under the Longshoremen's and Harbor Workers' Compensation Act may not be pressed in state court. The procedures for pressing claims under the Act are set forth in 33 U.S.C. § 919 *et seq.* We do not pass on the issue of laches which was not considered by the Board, or briefed or argued by either party in this appeal.

The decision of the Benefits Review Board is vacated and the cause is remanded for further proceedings consistent with this opinion.

Adm. Office, U.S. Courts – Addison C. Getchell & Son, Inc.

APPENDIX B

BENEFITS REVIEW BOARD
U.S. DEPARTMENT OF LABOR
Washington, DC 20036

DONALD J. SIMPSON,
Claimant-Petitioner

v.

BATH IRON WORKS CORPORATION

and

AMERICAN MUTUAL LIABILITY
INSURANCE COMPANY,
Employer/Carrier-
Respondents

Filed as Part of the Record Jun. 11, 1981

BRB No. 78-620

DECISION AND ORDER

Appeal from the Decision and Order of William A. Gershuny, Administrative Law Judge, United States Department of Labor.

Jonathan W. Reitman (McTeague, Higbee & Tierney), Brunswick, Maine, for the claimant.

Stephen Hessert (Norman & Hanson), Portland, Maine, for the employer/carrier.

Before: SMITH, Chief Administrative Appeals Judge, MILLER* and KALARIS, Administrative Appeals Judge.

*Dissent by MILLER, Administrative Appeals Judge, to follow.

SMITH, Chief Administrative Appeals Judge:

This is an appeal by claimant from a Decision and Order (78-LHCA-975) of Administrative Law Judge William A. Gershuny denying benefits under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq. (hereinafter, the Act). This appeal raises an issue of first impression which required the Board to construe Section 3(a) of the pre-1972 Act and to decide the retroactive effect, if any, of Calbeck v. Travelers Insurance Co., 370 U.S. 114, 82 S.Ct. 1196 (1962). Given the importance and potentially far-reaching effect of this case, the Board held oral argument at Portland, Maine, on August 22, 1979.

The issue on appeal is whether claimant, who was injured in 1941 while working on a ship under construction and who received state workers' compensation, is entitled to compensation under the version of Section 3(a) of the Act in effect at the time of injury. That section provided:

> Compensation shall be payable under this chapter in respect of disability or death of an employee but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by state law.... [Emphasis added].

33 U.S.C. § 903(a); 44 Stat. 1424 (underlined proviso

repealed in 1972). More specifically, the issue is whether Calbeck, supra, which was decided 21 years after claimant's injury, applies retroactively to the instant case, extending coverage to claimant. Calbeck held that injuries incurred during new ship construction over navigable waters -- injuries which were traditionally compensable only under state compensation statutes -- fall into the twilight zone of concurrent federal and state jurisdiction. Further, it held that a claimant's mere acceptance of state benefits does not constitute a binding election of remedies barring a subsequent award of federal benefits.

The facts in this case are the following. During November, 1941, claimant was working as a welder aboard the deck of a vessel under construction on a marine railway at Bath Iron Works, a shipyard located on the Kennebec River in Maine. He sustained severe multiple injuries when he fell from the deck, injuries which rendered him paraplegic and totally disabled despite prolonged hospitalization and treatment.

Claimant sought and was awarded benefits under the Maine Workmen's Compensation Act at the maximum allowable rate of $18 per week from November, 1941 through April 8, 1948. In 1948, when claimant's accumulated compensation reached the State's $6,000 ceiling on benefits, he petitioned the State Industrial Commission for further reimbursement of medical

expenses and supplies. The request was granted, but the employer and insurance carrier appealed to the Supreme Judicial Court of Maine, which held that the Commission lacked authority to award funds in excess of the $6,000 limit. Simpson's Case, 144 Me. 162 (1949). As a result of the court's decision in 1949, claimant, who has been unemployed and confined to a wheelchair since 1941, received no state compensation or medical benefits after April, 1948. Twenty-nine years after the State judgment and almost 36 years after the injury itself, claimant filed for benefits under the Longshore Act on March 22, 1977.[1]

At a hearing on October 23, 1978, the administrative law judge held that Shea v. Texas Employers' Insurance Association, 383 F.2d 16 (5th Cir. 1967), was dispositive and required dismissal of the claim, because claimant had no right to benefits under the Act at the time of injury. In Shea, the court denied Longshore

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[1]At the hearing, the parties stipulated to the following facts: Employer did not file a first report of injury under Section 39(a); employer did not file a notice of controversion pursuant to Section 14(d); employer had actual notice of the injuries; claimant was an employee "in the common law sense" in 1941; the injury was work-connected; claimant has not worked since the injury; and the claim was mailed to the Department of Labor on March 22, 1977. See Transcript at 18-23.

benefits in a fact situation similar to the instant case. A painter fell from a scaffold in 1960 while working on a vessel under construction but afloat in navigable waters. Prior to the issuance of Calbeck, supra, in 1962, he litigated his claim for state benefits to a final judgment and received an award. He subsequently sought a supplemental award under the Act. Shea held that claimant was barred from seeking a federal award by Section 3(a) of the Act. Since the state court had expressly determined that it had jurisdiction and awarded compensation, the Section 3(a) proviso of the Act ("compensation shall be payable...if recovery... may not validly be provided by state law") was not met; and thus, no Longshore benefits could be awarded. The court held that the twilight zone doctrine of concurrent state and federal jurisdiction established in Davis v. Department of Labor, 317 U.S. 249 (1942), and Calbeck, supra, applies only in advance of trial. The instant claim was no longer in the twilight zone once the state court expressly determined its jurisdiction and awarded compensation.

On appeal, claimant contends 1) that Shea is not dispositive and that Calbeck, supra, should be applied restroactively to the claimant's injury and resulting disability in 1941 and 2) that his claim is not barred by the one year statute of limitations in Section 13(a) because the statute was tolled

under Section 30(f) by employer's failure to file a report of injury pursuant to Section 30(a). In response, employer contends that Shea is dispositive.

The Board's scope of review is governed by statute. 33 U.S.C. § 921(b)(3). It must affirm a decision where the findings and concusions of the administrative law judge are supported by substantial evidence in the record considered as a whole, are not irrational, and are in accordance with law. O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965). However, the Board can affirm a decision and order based on reasoning different from that used by the administrative law judge. See United Brands Co. v. Melson, 594 F.2d 1068, 10 BRBS 494 (5th Cir. 1979).

We decline to adopt the hearing officer's holding that Shea, supra, should be applied to this case. The reasoning in Shea appears to ignore Calbeck's holding that federal coverage is to extend to the limit of Congress's constitutional power, whether or not a particular injury might also be covered by a state law. Calbeck, supra at 117. Also, Shea relies on that part of Section 3(a) which was effectively removed from the Act by Calbeck, and it is therefore an improper application of that section. 4 Larson's Workmen's Compensation Law § 89.53(b) at 16-276, 16-277. Perhaps, for this

reason, Shea has not been used as precedent for courts deciding similar cases. Most importantly, Shea did not specifically consider whether it is proper to apply Calbeck retroactively.

We now turn to the question of whether Calbeck should be applied to an injury which occurred more than 20 years before it was decided. Claimant argues that the Supreme Court could have precluded retroactive application of Calbeck by stating that the decision would apply prospectively only, by limiting the retroactive effect to the case in which the rule was announced, or by retroactively applying Calbeck to pending cases only. However, claimant stresses that the Supreme Court declined to so limit Calbeck, because the court believed that it was interpreting the law as it had stood from the time the Longshore Act was enacted in 1927.

The traditional presumption that court decisions are intended to receive general retroactive effect is consistent with claimant's position. Robinson v. Neil, 409 U.S. 505, 507-8 (1973). However, modern courts have often applied cases only to future litigation, especially where a well-settled rule of law is overruled and it appears unfair and unnecessary to upset the expectations of the parties. See Linkletter v. Walker, 381 U.S. 618, 624 (1965). Where an overruling court does not specify whether its decision is to be applied retroactively, lower courts are entitled to reach their own conclusion as

to this issue. Annot., "Prospective or Retroactive Operation of Overruling Decision," 10 ALR 3d 1371, 1399 (1966). The Supreme Court has not expressly clarified how much retroactive effect Calbeck should have.

In Chevron v. Huson, 404 U.S. 97, 92 S.Ct. 349 (1971), the court discussed three separate factors to be considered when there is a question of nonretroactivity.[2]

> First, the decision to be applied non-retroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, see e.g., Hanover Shoe, Inc. v. United Shoe Machinery Corp., supra, at 496...or by deciding an issue of first impression whose resolution was not clearly foreshadowed, see e.g., Allen v. State Board of Elections, supra, 393 U.S. at 572.... Second, it has been stressed that "we must...weigh the merits and demerits in each rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." Linkletter v. Walker, supra, 381 U.S. at 629.... Finally, we have weighed the inequity imposed by retroactive application, for where a decision of this Court

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[2]In Huson, the Court refused to apply one of its decisions retroactively to an action under the Outer Continental Shelf Lands Act for personal injuries sustained on an offshore oil drilling rig. The action was commenced and prosecuted on the reasonable belief, based in federal decisions, that a state one-year statute of limitations did not apply. A Supreme Court decision requiring a contrary conclusion was announced while pre-trial discovery proceedings were pending.

> could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship, by a holding of nonrestroactivity.' Cipriano v. City of Houma, supra, 395 U.S. at 706...

A court, in determining whether a decision should be retroactively applied, must therefore weigh the merits and demerits of a particular case by looking to the prior history of the rule in question, to its purpose and effect, to whether retroactive operation will create or mitigate any injustice, and to what extent reliance was placed on the previous rule. Thus, giving or denying retroactive effect is a matter of judicial policy. Where equity and circumstance warrant, a judicial decision may be given solely prospective effect.

We will now consider the first factor cited in Huson, i.e., whether Calbeck decided an issue of first impression whose resolution was no clearly foreshadowed. Consideration of this issue requires a review of the case law upon whichemployer in this case relied during the time period from November, 1941, when the injury occurred, through April, 1948, when the last payment of state compensation was made. We focus on this period because the purpose of this criteria is to determine whether it was reasonable for the employer to rely on prior case law holding that new ship construction was covered only by state worker's compensation act. Jackson

v. Justices of Superior Court, 549 F.2d 215, 218 (1st Cir. 1977), cert. denied, 430 U.S. 975 (1977); see Brown v. Louisiana, U.S., 100 S.Ct. 2214, 2223 (1980). If it had anticipated furture liability under the Longshore Act, the employer was required to file a notice of injury or death under Section 30(a) of the Act, 33 U.S.C. § 930. Had employer filed the report in this case, the one year statute of limitations in Section 13(a) of the Act, 33 U.S.C. § 913, would have barred the claim, because the injury occurred in 1941 and the claim was filed in 1977.

Our review of the case law, infra, indicates that the court in Calbeck decided an issue whose resolution was unclear during the period from November, 1941 to 1948. Moreover, even looking at the case law during the entire period from November, 1941 until the issuance of Calbeck in 1962, we cannot conclude that Calbeck was clearly foreshadowed.[3]

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[3]In reaching our conclusion, we are fully aware of the Supreme Court's statement in Calbeck, 82 S.Ct. at 1203-1204, that its construction of the Section 3(a) proviso is consistent with its prior decisions in Parker v. Motor Boat Sales, 314 U.S. 244, 62 S.Ct. 221 (1941), Davis v. Department of Labor, 317 U.S. 249, 63 S.Ct. 225 (1942), and Avondale Marine Ways, Inc. v. Henderson, 346 U.S. 366, 74 S.Ct. 100 (1953). However, the dissent in Calbeck concluded that the majority's result was not clearly foreshadowed. For almost 40 years, it was unequivocally recognized that, for those employed in new ship construction, recovery for disability or death may validly be provided by

Prior to the passage of the Longshore Act in 1927, the Supreme Court decided Grant Smith-Porter Ship Co. v. Rohde, 257 U.S. 469, 42 S.Ct. 157 (1922), in which it established the maritime but local doctrine for determining whether state compensation acts or federal maritime law applied. The Court held that the uniformity of federal maritime law was not prejudiced by the application of state statutes to maritime employment that was local in character, i.e., activity bearing no direct relationship to navigation and commerce. Rohde was an admiralty suit for injuries sustained by a worker on a partially completed ship lying at a dock. The Court dismissed the suit and held that claimant's exclusive remedy was under the state compensation statute.

For at least 15 years after passage of the Act, courts applied the maritime but local doctrine and amassed an elaborate body of law classifying endless combinations of land and maritime employment factors. Since Section 3(a) of the Longshore

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state law, Grant Smith-Porter Ship Co. v. Rohde, 257 U.S. 469, 42 S.Ct. 157 (1922), and that the Act does not apply to injuries on navigable waters where a State can constitutionally provide a compensation remedy. 82 S.Ct. at 1208-1209. Larson agrees; he states that in Calbeck the Supreme Court by judicial construction deleted the Section 3(a) proviso from the Longshore Act. 4 Larson's Workmen's Compensation Law § 89.25 at 16-168, 169.

Act literally provided for an absence of state power as a prerequisite for federal coverage, this body of case law defining state power over certain maritime injuries was utilized in determining the scope of the Longshore Act. One of the most clearly delineated distinctions, which started with Rohde, was between injuries incurred during construction work on uncompleted vessels and injuries incurred during repair work on already completed vessels. The former were deemed to be within the purview of state compensation statutes, whereas the latter were deemed to be beyond the reach of state statutes when the injury occurred on navigable waters. Although Rohde was decided prior to the passage of the Act, the Act effected no change in this distinction. 4 Larson's Workmen's Compensation Law § 89.22 at 76-159, fn. 65 (180 ed.).[4] In Crowell v. Benson, 285 U.S. 22, 52 S.Ct. 285 (1932), a constitutional challenge to the Longshore Act, the Court stated:

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[4]As support for this conclusion, Larson cites John Baizley Iron Works v. Span, 281 U.S. 222, 50 S.Ct. 306 (1930), which was decided after passage of the Act. The Court held that a claimant injured while doing repair work on an already completed vessel lying in navigable waters could not constitutionally recover under a state compensation act. Repairing a completed ship has a direct connection with navigation and commerce, and hence recovery is under the Longshore Act. The Court distinguished Rohde, supra.

> In limiting the application of the Act to cases where recovery "through workmen's compensation proceedings may not validly be provided by State law," the Congress evidently had in view the decisions of this Court with respect to the scope of the exclusive authority of the national legislature. (Footnote omitted).... Within its sphere the statute wad designed to accomplish the same general purpose as the Workmen's Compensation Laws of the states.

In a footnote, the Court cited John Baizley Iron Works v. Span, 281 U.S. 222 (1930), and Rohde, supra. Thus, the Court implied that the Section 3(a) proviso of the Longshore Act incorporated the "maritime but local" distinction.[5]

The Fourth Circuit interpreted Crowell in this way in U.S. Casualty Co. v. Taylor, 64 F.2d 521 (1933), cert. denied, 290U.S. 639 (1933). The court held that the Section 3(a) proviso means that compensation under the Act may lawfully be paid only in those cases in which a state has no authority to act. Concurrent remedies in both state or federal

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[5] Crowell and Larson's conclusion that the passage of the Longshore Act effect no change in the new ship construction versus ship repair distinction put to rest claimant's contention that the Longshore Act never incorporated the "maritime but local" distinction and that therefore claimant's injury on a ship under construction fell within the jurisdiction of the Longshore Act. Claimant's Brief, p. 5.

proceedings are not available. Relying on Rohde, supra, and Span, supra, the court held that a claimant who was injured while engaged in the construction of a new ship that had been launched but not quite completed could not recover under the Longshore Act, since the state had authority to provide compensation.

The Fifth Circuit, however, in Continental Casualty Co. v. Lawson, 64 F.2d 802 (5th Cir. 1933), rejected Crowell's implication and instead adopted a significantly different interpretation of the Section 3(a) proviso, similar to the view adopted 29 years later by the Supreme Court in Calbeck, 82 S.Ct. at 1205 (1962). Lawson stated that federal compensation laws should be liberally construed to cover every case where the injury occurred in navigable waters; Congress intended to exercise to the fullest extent all the power and jurisdiction it had over the subject matter. Since the passage of the Longshore Act, the importance of the question whether jurisdiction over a maritime tort could be asserted under the compensation laws of the states (the Rohde line of cases) or existed exclusively in admiralty, had largely disappeared. The court's result in Lawson, however, conformed to the traditional distinction between ship construction and ship repair. The court held that an injury incurred during repair of a boat on a marine railway was over navigable waters, since the statutory phrase "any dry dock" includes

a marine railway. Hence, the injury was compensable under the federal Act. Because Lawson was not on point factually with the instant claim and because the court appeared to reject the Supreme Court's interpretation of Section 3(a) in Crowell, Lawson did not clearly indicate that employer would have Longshore Act liability.

Thus, until November, 1941 when claimant's injury occurred, the weight of case law held that, under the maritime but local doctrine, claimants injured during the course of new ship construction could not recover compensation under the Longshore Act, but could recover only under a state act. Therefore, employer in the instant case had no reason to believe that the Longshore Act was applicable and had no reason to file a Section 30(a) report within 10 days of the injury. Instead, it promptly paid state compensation benefits.

In the period subsequent to claimant's date of injury, the case law began to change with regard to the maritime but local doctrine and the applicability of the Longshore Act to injuries during new ship construction. In this period, the case law was frequently unclear, conflicting, and controversial. The confusion started with Parker v. Motor Boat Sales, 314 U.S. 244, 62 S.Ct. 221 (Dec. 8, 1941). The court did not apply the maritime but local doctrine to a janitor who drowned in a navigable river when a motor boat in which he was

riding capsized on a trip made to test an outboard motor. The Court held that the Section 3(a) proviso, which allowed federal compensation only if recovery could not be validly provided by state law, did not bar claimant's recovery under the Longshore Act. It held that the field in which a state may not validly provide compensation is the same field which the line of decisions based on Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917), excluded from state compensation laws.[6]

In Davis v. Department of Labor, 317 U.S. 249, 63 S.Ct. 225 (Dec. 14, 1942), the Court held that, where a claimant had sought benefits only under a state workmen's compensation act for the death of a structural steel worker who drowned while helping dismantle a bridge, the state could make an award under its compensation law consistent with the federal constitution. The Court announced the "twilight zone" rule: All borderline cases, in which it is doubtful whether the federal or state act applies, are to be resolved in favor of coverage by the first act under which application is made by claimant. 4 Larson's Workmen's Compensation

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[6] Jensen held that the New York's Workmens' Compensation Act could not constitutionally be applied to a stevedore injured over navigable waters on board ship while unloading cargo at a pier. The application of individual state acts to maritime workers injured on navigable waters would prejudice the uniformity of maritime law.

Law § 89.24 at 16-164, 165. The Court stated that the clause in the federal act which makes it exclusive, 33 U.S.C. § 905, "gains meaning only after a litigant has been found to occupy one side or the other of the doubtful jurisdictional line..." 63 S.Ct. at 229 [emphasis added]. Thus, the Court appeared to rule out recovery under both state and federal acts by means of successive awards.

As Larson explains, Davis left open the question of defining the extent of the twilight zone in which there was concurrent state and federal jurisdiction. It was generally assumed until 1949 that "the new doctrine would apply only when new fact combinations appeared which did not range themselves clearly on one side or the other of the twilight zone as marked out by these numerous and well-established precedents [on familiar categories of employment.] If they did so fall outside the twilight zone, it was apparently also assumed that, ...if they fell clearly on the state side under the maritime-but-local cases, state jurisdiction would be exclusive because of the express provision in the Longshore Act abdicating jurisdiction when state acts could validly apply." 4 Larson at 16-165.

Subsequent to Parker, supra, and Davis, supra, but prior to 1948, there were three decisions by U.S. Court of Appeals with differing interpretations of whether Rohde, supra, was still good law in light of Parker and Davis. One of the decisions also

permitted a Longshore award subsequent to a state award. None of these decisions, however, involved an injury during new ship construction. The first case, Royal Indemnity Co. v. Puerto Rico Cement Corp., 142 F.2d 237 (1st Cir. 1944), cert. denied, 323 U.S. 756 (1944), was decided by the U.S. Court of Appeals for the First Circuit -- the circuit in which claimant's injury in the instant appeal occurred. The Court cited Rohde, supra, as good law.[7]

> The clause permitting recovery only where compensation 'may not validly be provided by state law' is not an independent condition, but a limitation upon the previous clause referring to navigable waters, necessary in light of the above decisions [Southern Pacific Co. v. Jensen, and others], and because not all injuries upon navigable waters are exclusively within federal jurisdiction. Grant Smith-Porter Ship Co. v. Rohde, 257 U.S. 469 (1922)....

The Court further stated that by the Section 3(a) proviso, Congress "intended to provide federal compensation in the maritime field up to the line where local compensation would not be excluded by the existence of federal admiralty jurisdiction."

The second case, Travelers Insurance Co. v. McManigal, 139 F.2d 949 (4th Cir. 1944), however,

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[7]The case arose under the Longshore Act, as extended by the Defense Base Act. Claimant was injured on a military base in Puerto Rico. The court held that the Section 3(a) proviso was inapplicable to the Defense Base Act.

held that Rohde's Maritime but local doctrine could no longer be applied to bar Longshore Act compensation to a carpenter killed while engaged in construction of a dry dock on a navigable river. The claimant had sought compensation only under the Lonshore Act. The court emphasized that this area of law was controversial and unclear:

> The limits of this doctrine ["maritime but local" doctrine as it related to the Section 3(a) proviso] are by no means clear; and the contrast between the approval of federal jurisdiction in Parker v. Motor Boat Sales [cite omitted] and the approval of state jurisdiction in Davis v. Department of Labor [cite omitted] does not tend to dispel the doubts which beset the courts and the interested parties in this field of law. [emphasis added].

139 F.2d at 953.

Even if employer in the instant case had interpreted McManigal as indicating possible federal concurrent jurisdiction for claimant's injury, the employer was still justified in not filing a Section 30(a) report. McManigal did not raise the issue of whether a claimant could receive both a state award and then a federal award. Employer could have justifiably relied on Davis's rule that coverage by the first act under which application was made by claimant would be upheld, and could rely on the apparent corollary that where a claimant had first sought state compensation benefits, he was limited

to that recovery. Larson notes that, prior to the issuance of Calbeck in 1962, there was substantial question whether the full implications of concurrent state and federal jurisdiction (pursuant to the twilight doctrine) would be followed, in the form of a state award and a subsequent federal award. 4 Larson's Workmen's Compensation Law § 89.53 at 16-273 to 16-277.

The third case was De Bardeleben Coal Corp. v. Henderson, 142 F.2d 481 (5th Cir. 1944). The Court affirmed the dismissal of a suit to set aside an award under the Longshore Act. The claimant had previously recived state compensation benefits for the death of decedent, a member of a shore gang who drowned when he fell off a barge. Employer had contended that since claimant had already received state benefits, the Section 3(a) proviso barred recovery under the Longshore Act. The Fifth Circuit stated that Parker, supra, substantially adopted the view it had previously expressed in Lawson, supra. It then held that by the Section 3(a) proviso Congress did not intend to relinquish any part of the field which it could validly occupy. Rather, Congress intended to save the Act from judicial condemnation by making it clear that it did not intend to legislate beyond its constitutional powers. The Act should be applied very liberally; and prior case law establishing the "maritime but local" doctrine should be disregarded.

Moreover, the court stated that Davis, supra, was an aberration, a quasi-legislative decision, and it disregarded Davis's rule that seemed to limit compensation in a twilight zone case to recovery under either the federal statute or a state statute, but not both.

We do not believe that Henderson clearly foreshadowed Calbeck. Nor do we believe that based on Henderson employer should have filed a Section 30(a) report in order to start the running of the statute of limitations. 33 U.S.C. § 930(f). While Henderson's construction of the Section 3(a) proviso -- essentially reading it out of the Act -- was adopted by the Calbeck court (82 S.Ct. 1196, 1205), the Supreme Court did not adopt that construction until 1962.[8] As late as 1959 in Hahn v. Ross Island Sand & Gravel Co., 358 U.S. 266 79 S.Ct. 266, the Court still recognized the validity

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[8]At 4 Larson's Workmen's Compensation Law § 89.25 at 16-166, 167 Larson notes that the U.S. Supreme Court greatly surprised observers when it later seemed to reject the widely held assumption that past clear precedent defined the scope of the twilight zone. The Court issued two per curian memorandum opinions, Bethlehem Steel Co. v. Moores, 335 U.S. 874, 69 S.Ct. 239 (Dec. 6, 1948), and Baskin v. Industrial Acc. Comm'n., 338 U.S. 854, 70 S.Ct. 99 (Oct. 24, 1949), which dealt with repair work on previously completed vessels. In both, claimants sought state compensation only; and the Court held that the state could award compensation. Thus, the Court allowed concurrent state jurisdiction in a traditionally federal area. These decisions caused

of the Section 3(a) proviso as it had been previously interpreted.

Under the first criterion for nonretroactivity of a case set out in Huson, supra, we conclude that Calbeck, supra, was not clearly foreshadowed by case law. On the contrary, the case law prior to Calbeck was frequently unclear and conflicting. The First Circuit has recently examined the effect of a similarly ambiguous situation in determining the retroactive effect to be given the decision of Breed v. Jones, 421 U.S. 519 (1975), which applied the double jeopardy clause of the Fifth Amendment to juvenile defendants transferred to adult courts after a judicial determination of guilt in juvenile court. Jackson v. Justices of Superior Court of Mass., 549 F.2d 215 (1st Cir. 1977). In discussing the effect of the ambiguous state of the law in this area on the reasonableness of the state's reliance on the old rule, the court said that, "While, concededly, Breed was not a case, which, for example, by overruling prior Supreme Court decisions manifestly

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considerable speculation as to the true meaning of Davis, supra. It is important to note that the Court did not rule on whether the converse was true, i.e., whether there was concurrent federal jurisdiction in a traditionally state area -- the crucial issue for the instant employer, until Calbeck v. Travelers Insurance Co., 370 U.S. 114, 82 S.Ct. 1196 (1962). A conclusion that the converse was true could not be readily assumed because of the Section 3(a) proviso.

marked 'a clear break with the past,' [citation omitted] we do not believe that it was so clearly a mere application of established principles that we could apply it retroactively without further analysis." Jackson, supra at 218. The court then examined the purposes of Breed.

Similarly, the case law at issue here does not show that Calbeck was "a clear break with the past." There were some circuit court cases decided after the date of claimant's injury which might have intimated that his injury was covered under the new "twilight zone" doctrine, but it would be unfair to charge an employer with intuition keen enought to perceive this intimation without the benefit of hindsight. We must, therefore, examine the purposes of Calbeck in order to determine whether these purposes will be furthered or retarded by retroactive application of Calbeck to the present case. This second criteria of Huson, supra, has been described as the most important element of any retroactivity determination. Brown v. Louisiana, U.S., 100 S.Ct. 2214, 2219 (1980).

In Calbeck, the Court read broadly the scope of Section 3(a) of the Act in order to achieve the underlying purposes of the Act itself, which were identified as, "ensur[ing] that a compensation remedy existed for all injuries sustained on navigable waters, and... avoid[ing] undertainty as to the source, state or federal, of that remedy," Calbeck, supra at 124.

The Court therefore rejected a literal interpretation of Section 3(a), which would have extended federal jurisdiction only to cases where a state "may" compensate the employee, because this construction might have created a "vacuum" of coverage, in which states refused to pay claims of maritime workers within an area of "local concern." Id. at 125. If a state "may" constitutionally have provided coverage under the maritime-but-local decisions but simply had not done so, certain workers who were clearly within federal constitutional maritime power, if Congress chose to exercise it, were in danger of being left without any coverage, state or federal. 4 Larson's Workmen's Compensation Law § 89.25 at 16-169, 170. In the instant case, denying retroactive operation of Calbeck will not defeat this purpose, nor will it serve to further this purpose, because claimant received compensation under the Maine workmen's compensation statute. He was not left without a remedy.

As the First Circuit noted in Jackson, supra, at 218, it is possible that the purpose of a decision may or may not be served by retroactive application, depending on the position of parties. The Jackson court found that one purpose of forbidding the transfer of defendants to court after an adjudicatory hearing was the elimination of the heavy pressures and burdens of two trials. Retroactive application would only

serve this purpose if the second trial had not yet taken place. IF it had, retroactive application of the new rule could not undo the damage already done by the second trial.

Here, if the claimant had been denied state as well as federal compensation, the argument for retroactive application of Calbeck would be stronger because it would permit recovery by a claimant who previously was not covered by either state or federal acts. Thisis not, however, the situation here. We therefore need not decide whether such a change in the factual situation would mandate retroactive application.

The Court's second justification for Calbeck was to eliminate the uncertainty, litigation, and changeability of federal coverage which resulted from the incorporation of the maritime but local doctrine into the Section 3(a) proviso. The contours of the doctrine were too vague and made federal coverage depend on developments in constitutional interpretation as to the scope of state power to compensate injuries over navigable waters. 4 Larson at 16-171. We do not see how allowing retroactive application will help eliminate uncertainty and litigation. In fact, were we to apply Calbeck retroactively, a flood of litigation would probably result by workers and employers similarly situated to claimant and the employer in this case. Thus, this second purpose of Calbeck is also neither

defeated nor furthered by denying it retroactive application in this particular case.

Finally, we turn to the third criterion of Huson, supra, which is whether retroactive application of the decision will have an unfair impact on one party which outweighs the benefit to the other party. We conclude that applying Calbeck retroactively would result in greater inequity to employer than benefit to claimant in this case. As our review of the case law indicates, employer discharged its responsibility to claimant under the law as it stood at the time of the injury and for the duration of the state compensation payments. Since it appeared that the Longshore Act was inapplicable, employer had no reason to file a Section 30(a) report during that period to start the running of the statute of limitations.[9] To subject employer at this late date to unexpected liability for an

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[9]The instant unusual case is distinguishable from Cooper v. John T. Clark & Son, 11 BRBS 453 460, BRB No. 78-525 (1979), in which the Board held that employer's lack of definite knowledge that the injury was within the coverage of the Act does not prevent the tolling of the statute of limitation under Section 30(F), where no Section 30(a) report has been filed. The Board in the instant case is not directly ruling on the issue of whether the claim was timely filed under Section 13(a) and Section 30(f). Our comments on employer's failure to file a Section 30(a) report are made in the context of the retroactivity issue and whether it would be just to impose liability on employer, given the state of case law from employer's perspective in the 1940's.

injury which occurred nearly 30 years ago would be unjust.

Rather than retroactively apply Calbeck to this case, we apply the law in effect during the time when claimant's state claim was pending. We hold that the maritime but local rule, at that time incorporated by Section 3(a) of the Act, allowed recovery only under state compensation laws for employees engaged in new ship construction. Thus, the claimant is not covered by the federal Act.

Given our resolution of this issue, we need not reach the other issues raised on appeal: 1) whether the injury occurred over navigable waters, 2) whether res judicata or the doctrine of election of remedies applies, 3) whether the claim is barred by the statute of limitations and the equitable doctrine of laches and 4) whether the Section 20(a) presumption applies to the issue of jurisdiction.

Accordingly, we affirm the Decision and Order below denying benefits.

SO ORDERED.

/s/ Samuel J. Smith
SAMUEL J. SMITH
Chief Administrative Appeals Judge

I Concur: /s/ Ismene M. Kalaris
ISMENE M. KALARIS
Administrative Appeals Judge

Dated this 11th day of June, 1981

APPENDIX C

BENEFITS REVIEW BOARD
U.S. DEPARTMENT OF LABOR
Washington, DC 20036

DONALD J. SIMPSON,
Claimant-Petitioner

v.

BATH IRON WORKS CORPORATION

and

AMERICAN MUTUAL LIABILITY
INSURANCE COMPANY,
Employer/Carrier-
Respondents

Filed as Part of the Record July 28, 1981

BRB No. 78-620

DISSENTING OPINION

MILLER, Administrative Appeals Judge, dissenting:

I respectfully dissent from my colleagues' holding that the claimant, Donald Simpson, cannot be afforded coverage under the Act.

I

As a preliminary matter, I would hold that the claimant was injured upon a situs covered by the Act.[1]

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[1]The administrative law judge made no specific findings on the situs issue (other than noting

Unamended Section 3(a) provides,

> Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by state law....

44 Stat. 1424; 33 U.S.C. § 903(a). The evidence establishes that, when injured, claimant was working upon a vessel under construction on a marine railway at Bath Iron Works. Pre-amendment case law construed the term "any dry dock" to include marine railways. Maryland Casualty Co. v. Lawson, 101 F.2d 732 (5th Cir. 1939); accord, Avondale Marine Ways, Inc. v. Henderson, 201 F.2d 437 (5th Cir.), aff'd per curiam, 346 U.S. 366 (1953).[2] Employer contends that claimant fell onto "terra firma" as opposed to the marine railway, and is thus precluded from coverage. However, claimant

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that the claimant "fell to the ground" from the deck of a vessel), having disposed of the case on another jurisdictional basis. However, the facts are sufficiently developed to render a jurisdictional determination in favor of claimant, and, therefore, no useful purpose would be served by remanding the case to the administrative law judge for further findings regarding this issue.

[2]Moreover, jurisdiction has been upheld in situations such as the instant one, in which a vessel resting on a marine railway was under construction rather than repair. In Gretna Machine & Iron Works,

was working on a marine railway at the time the events leading to the injury were set in motion. Thus, the maritime situs of the injury was established, and claimant cannot be barred from recovery on the basis argued by employer. See Minnie v. Port Huron Terminal Co., 295 U.S. 647 (1935). Compare T. Smith & Son, Inc. v. Taylor, 276 U.S. 179 (1928).

II

I must strongly disagree with my colleagues' determination that the Section 3(a) proviso ("if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by state law") bars claimant from coverage under the pre-amendment Act. Calbeck v. Travelers Insurance Co., 370 U.S. 114 (1962), held

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Inc. v. Neuman, 316 F. Supp. 147 (E.D. La. 1970), aff'd, 446 F.2d 550 (5th Cir. 1971), the court held that a graving dock where claimant, a welder assisting a barge construction, fell and was injured while descending a ladder resting against the barge deck, was not excluded from the "any dry dock" language of the Act, even though it was being used exclusively for new ship construction at the time of the accident. See also Kelso Marine, Inc. v. Hollis, 316 F.Supp. 1271 (S.D. Tex. 1970), aff'd per curiam, 449 F.2d 342 (5th Cir. 1971) (holding that the Act covered an employee injured while engaged in building an unlaunched barge on a vertical lift dry dock).

> that Congress used the phrase 'if recovery ...may not validly be provided by State law' in a sense consistent with the delineation of coverage as reaching injuries occurring on navigable waters. By that language... Congress brought under the coverage of the Act all such injuries whether or not a particular one was also within the constitutional reach of a state workmen's compensation law.

Calbeck, 370 U.S. at 126-27 [footnote omitted]. In so holding, the Supreme Court established the full reach of pre-amendment Section 3(a) of the Act. See Calbeck, 270 U.S. at 126.

I would reverse the Decision and Order, since Calbeck was an interpretive decision which was in effect at the time this Longshore Act claim was litigated. Assuming arguendo, that Calbeck is an overruling decision, as my colleagues contend, I would find that it should be retroactively applied.

Section 3(a) of the Act is a jurisdictional section. "A court lacks discretion to consider the merits of a case over which it is without jurisdiction, and thus, by definition, a jurisdictional ruling may never be made prospectively only." Firestone Tire & Rubber Co. v. Risjord, 101 S.Ct. 669, 676 (1981).[3] Moreover, in general,

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[3]The Court in Firestone considered whether a motion to disqualify counsel was directly appealable under 28 U.S.C. § 1291. Both 28 U.S.C. § 1291 and 33 U.S.C. § 903(a) are jurisdictional,

> Despite...conflicting views, and even though there have been many departures from the traditional policy in favor of retroactive application of an overruling decision, it is still accepted as a general rule that unless there are special circumstances warranting the denial of retroactive application, or unless the overruling court has expressly indicated otherwise, it may properly be assumed that an overruling decision is entitled to retroactive as well as prospective effect.

Annot., 10 ALR 3d 1371, 1384 (1966) (footnotes omitted).[4]

My colleagues err in ignoring the established principle that overruling decisions, particularly overruling jurisdictional decisions, should be retroactively applied.

While the general principles determining retroactivity of an overruling decision should control, I would also find that Calbeck should be retroactively applied under the test enunciated in Chevron Oil Co. v. Huson, 404 U.S. 97 (1971). In Huson, the court declined to apply a state statute of limitations made applicable to the case by

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thus the principles of Firestone are applicable to the instant case.

[4]It should also be noted that the retroactive application of an overruling decision is not prohibited by any constitutional provisions. In particular, it does not constitute an impairment of contract or a violation of prohibitions against ex post facto laws, or a denial of due process or equal protection. See Annot., supra, 10 ALR 3d at 1392-93.

Rodrigue v. Aetna Casualty & Surety Co., 395 U.S. 352 (1969) (issued while the Huson action was pending), which would have barred the claim. To hold the lawsuit retroactively time-barred would be anomalous, the Court stated, inasmuch as a primary purpose underlying the absorption of state law as federal law in the Outer Continental Shelf Lands Act was to aid injured employees by affording them comprehensive and familiar remedies. Discussing the retroactivity issue, the Court cited factors to be considered in determining when retroactive application is appropriate.

First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied or by deciding an issue of the first impression whose resolution was not clearly foreshadowed. Although Calbeck established the full reach of the law, its result was foreshadowed by the "twilight zone" cases, which appeared the year of the injury and during the period when employer was paying claimant compensation under the state act. See Calbeck 370 U.S. at 127.

My Colleagues concede that they

> are fully aware of the Supreme Court's statement in Calbeck, 82 S.Ct. at 1203-1204, that its construction of the Section 3(a) proviso is consistent with its prior decisions in Parker v. Motor Boat Sales, 314 U.S. 244, 62 S.Ct. 221 (1941), Davis v. Department of Labor, 317 U.S. 249, 63 S.Ct.

225 (1942), and Avondale Marine Ways, Inc. v. Henderson, 346 U.S. 366, 74 S.Ct. 100 (1953).

Majority Opinion, slip op. at 9 n. 3. Nonetheless, my colleagues choose to ignore the majority decision of the Supreme Court, relying instead on the dissent which stated that Calbeck was inconsistent with prior case law. Such reliance is not in accordance with law, since this Board must follow the desicion of the Supreme Court. See United States v. City of Philadelphia, 644 F.2d 187 (3d Cir. 1980); Kicklighter v. Ceres Terminal, Inc., 13 BRBS 109, BRB No. 79-550 (1981). Moreover, my colleagues' position is untenable since Parker, Davis and the other twilight zone cases reflect a rationale for the construction of the Section 3(a) proviso which is consistent with the Calbeck decision.

The second factor to be considered is the purpose and effect of the new rule established, and whether retroactive operation will further or retard its progress. In the Matter of S.S. Helena, 529 F.2d 744 (5th Cir. 1976), applied the Supreme Court's Moragne decision[5] (which established a new cause of action for wrongful death under maritime law) retroactively to an action filed before the date of that decision. Noted by the Court was that

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[5]Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970).

the primary purpose of Moragne was to "assure uniform vindication of federal policies." 529 F.2d at 748. Similarly, the purpose of the federal Act, and Calbeck's interpretation thereof, was to provide compensation for all injuries to employees on navigable waters, and to avoid uncertainty as to the source, state or federal, of that remedy. See Calbeck, 370 U.S. at 724. Thus, retroactive application of the rule would further the purpose of the Act.

The final factor involves a weighing of the equities or inequities that would result from the imposition of retroactive application. Claimant was 27 years old at the time of the accident, and since has neither walked nor been employed. Employer's liability under the state Act was extinguished after 1948, by which point claimant had received $6,000 for injuries which left him a lifetime paraplegic. My colleagues contend that, under these facts, applying Calbeck retroactively would result in "greater inequity to employer than benefit to claimant," since application of Calbeck would result in unexpected liability. My colleagues' balancing of the equities is in clear conflict with the beneficent purpose of the Longshore Act -- an Act intended to resolve all doubts in claimant's, not employer's, favor. See Voris v. Eikel, 346 U.S. 328 (1953).

It should also be noted that if employer had satisfied its duty of filing a Section 30(a) report of injury,[6] claimant would have been advised of his right to file a claim for compensation under the Act, and hence, the decision in Calbeck, as foretold by Parker and Davis, may have been the decision in the instant case. See infra.

Moreover, retroactive application of Calbeck is consistent with case law which has retroactively imposed liability on employers. In Usery v. Turner-Elkhorn Mining Co., 428 U.S. 1 (1976), coal operators contended that to retroactively impose liability upon them for their former employees' disabilities was to impermissibly charge the operators with an unexpected liability for past completed acts that were legally proper at the time. In response to that argument, the Supreme Court stated: "We find...that the imposition of liability for the effects of disabilities bred in the past is justified as a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor -- the operators and the coal consumers ...." 428 U.S. at 18.

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[6]See Castro v. McLean Industires, 12 BRBS 911, BRB No. 79-419 (1980), where the Board noted that employer's failure to file a Section 30(a) report was not excused by a belief that state workers' compensation was applicable.

The Turner-Elkhorn rationale applies by analogy to the facts of this case. Moreover, as indicated above, other equities weigh in claimant's favor.

III

Certain procedural issues raised by the parties must also be addressed before claimant can establish entitlement to compensation.

Unamended Section 13(a) provided, in part, that the right to compensation was barred unless a claim therefor was filed within one year after the injury. However, Section 30(a) required employer to file a report of injury within 10 days from the date of such injury. Where employer is given notice or has knowledge of the injury, and fails or neglects to file a report thereof, the Section 13(a) statute of limitations is tolled under Section 30(f) until such report is furnished since Section 13(a) does not become a viable issue unless and until Section 30(a) has been satisfied. See U.S.C. §§ 913(a), 930(a), and 930(f).

The parties stipulated that employer had actual notice of claimant's injury and that employer failed to file the Section 30(a) report. Therefore, claimant asserts, his claim was timely filed. Employer argues that Section 30(f) should not be construed to require employers to file reports in order to protect themselves against the prospect

of an "adverse Supreme Court ruling 21 years later," urging that the Board hold the claim barred under Section 13(a) and the equitable doctrine of laches.

"This Act must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongrouous restuls." Voris v. Eikel, 346 U.S. 328, 333 (1953). The Board must "not construe the Act so as to enable [employer's] to escape liability to persons entitled to recover for an admittedly compensable [injury] by reading into it technical restrictions on the tolling of the filing period which are inconsistent with the purposes of the Act." Ingalls Shipbuilding Division, Litton Systems, Inc. v. Hollinhead, 8 BRBS 159, 161, 571 F.2d 272, 274 (5th Cir. 1978), aff'g 6 BRBS 84, BRB No. 76-252 (1977), citing Blackwell Construction Co. v. Garrell, 352 F. Supp. 192, 196 (D.D.C. 1972); Smith v. Aerojet-General Shipyards, Inc., 13 BRBS 391, 647 F.2d 518 (5th Cir. 1981); Walker v. Pacific Architects & Engineers, Inc., 1 BRBS 145, BRB No. 74-112 (1974).

The fact that many years have passed between the work-incident and the filing of the claim does not affect employer's duty to file a Section 30(a) report.

> Statutes of limitations have traditionally been designed to promote fairness to defendants by precluding the prosecution of

> actions so old that 'evidence has been lost, memories have faded, and witnesses have disappeared.' Order of Railroad Telegraphers v. R.E.A., 321 U.S. 342, 349 (1944). Freedom from stale claims may still be outweighed, nonetheless, when justice requires that a delinquent plaintiff have his day in court. Burnett v. New York Central R.R. Co., 380 U.S. 424, 428 (1965). In addition, the humanitarian purpose of a remedial statute may be considered an expression of Congressional intent not to deprive a claimant of his rights when no purpose underlying a statute of limitations is served. Burnett, supra, at 434.

Belsom v. T. Smith & Son, Inc., 9 BRBS 333, 336, BRB No. 78-358 (1978), aff'd mem. 599 F.2d 447 (5th Cir. 1979).

Nor is employer's duty to file a 30(a) report alleviated by the fact that employer believed that claimant's injury was covered by the state Act. "Application of Section 30(f) does not require the employer to have definite knowledge that the injury comes within the jurisdiction of the Act." Castro v. McLean Industries, 12 BRBS 911, 914, BRB No. 79-419 (1980); Cooper v. John T. Clark & Son of Maryland, Inc., 11 BRBS 453, 460, BRB No. 78-525 (1979). See also Cuellar v. Garvey Grain Co., 11 BRBS 441, BRB No. 77-824 (1979), aff'd sub nom. Garvey Grain Co. v. Director, OWCP, 12 BRBS 821, 639 F.2d 366 (7th Cir. 1981).[7]

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[7]It should also be noted that the Supreme Court stated in Calbeck that it placed absolutely no

IV

Still to be addressed is whether the doctrines of election of remedies or res judicata bar the instant claim. In Landry v. Carlson Mooring Service, 13 BRBS 301, 643 F.2d 1080 (5th Cir. 1981), the Court held that the doctrine of election of remedies is "inapplicable when 'the second remedy which is pursued following an alleged "election" is not theoretically irreconcilable with the first, and does not require a claimant to assume a position inconsistent with that which he took in his initial quest for relief.'" Landry, 13 BRBS at 307, citing Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP, 583 F.2d 1273, 1277 (4th Cir. 1978), cert. denied, 440 U.S. 915 (1979). The reasoning in this case is equally applicable to the situation herein: therefore, the doctrine of election of remedies does not preclude the instant claim.[8]

Nor does the doctrine of res judicata bar claimant's claim under the Act. In Landry, the

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weight upon a Department of Labor regulation promulgated to employers which indicated that employers would not be penalized for failure to file a first report regarding employees injured while engaged in new ship construction. The Department of Labor regulation was deemed not to be controlling, in that its interpretation of the law was clearly erroneous. 370 U.S. at 127 n. 15.

[8]Moreover, the doctrine has no application where the available remedies are concurrent and consistent. See Pierce v. United States, 255 U.S. 398

Court interpreted the Supreme Court's decision in Thomas v. Washington Gas Light Co., 12 BRBS 828, 100 S.Ct. 2647 (1980), and held that, despite the broad language of the plurality, Thomas should be viewed as that position of the Members who concurred in the judgment in the narrowest grounds. See Gregg v. Georgia, 428 U.S. 153, 169 n. 15 (1976). See also Bardsdale v. Blackburn, 639 F.2d 1115, 1120 (5th Cir. 1981) (en banc). Thus, Thomas was interpreted as following the test of Industrial Commission of Wisconsin v. McCartin, 330 U.S. 622 (1947).

> Absent unmistakable language, in either the [Maine] Workmen's Compensation Act or the cases construing it, declaring recovery under the [Maine] act a final adjudication of all claims possibly arising from the injury, McCartin requires a finding that a subsequent recovery under the workers' compensation act of another jurisdiction is proper. Thus, the issue here is whether the law of [Maine] provides such unmistakable language.

Landry, 13 BRBS at 305 (emphasis in original). As the Court in Thomas noted, "[a]pparently only Nevada's Workmen's Compensation Act contains the unmistakable language required under

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(1921). Inasmuch as Calbeck clearly establishes concurrent jurisdiction over injuries such as those sustained by claimant, and since I would hold Calbeck retroactively applicable to the instant case, election of remedies cannot bar this claim.

the McCartin rule." Thomas, 12 BRBS at 836 n. 21, 100 S.Ct. at 2657 n. 21. Thus, the Maine statute does not contain sufficient language to invoke the rule of res judicata.[9]

V

In conclusion, claimant has indicated his recognition of the fact that, at the time of his injury, there was in effect under the Act a $7,500 maximum limit on the amount of compensation receivable thereunder. 33 U.S.C. § 914(m). Offsetting the $6,000 the claimant has already received under the state Act, the additional compensation due would be only $1,500, plus any additional assessments due pursuant to Section 14(e) of the Act. 33 U.S.C. § 914(e). However, medical services and supplies under Section 7, 33 U.S.C. § 907, are not taken into consideration in applying the limit upon compensation contained in the Act. Cardillo v. Liberty Mutual Insurance Co., 101 F.2d 254 (D.C. Cir. 1938). It is this modest assistance that claimant seeks, and to which he is entitled under the law.

Accordingly, I would reverse the decision below, and award claimant benefits under the Act.

/s/Julius Miller
JULIUS MILLER
Administrative Appeals Judge

[9]This is consistent with the Supreme Court's decision in Sun Ship, Inc. v. Commonwealth of Pennsylvania, 12 BRBS 890, 100 S.Ct. 2432 (1980).

APPENDIX D

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Washington, DC 20036

DONALD J. SIMPSON,
Claimant

v.

BATH IRON WORKS CORPORATION,
Employer

and

AMERICAN MUTUAL LIABILITY
INSURANCE COMPANY,

Carrier

Case No. 78-LHCA-957
OWCP No. 1-27995

DECISION AND ORDER

Before: WILLIAM A. GERSHUNY
Administrative Law Judge

Claimant seeks benefits under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 et seq., based on a 1941 injury.

The facts are not in dispute. On November 21, 1941, Claimant, while in the employ of Bath Iron Works, sustained a severe spinal injury when he fell to the ground from the deck of a vessel under construction. He has been a paraplegic and totally disabled ever since. Claimant sought and was awarded maximum benefits under the Workmen's

Compensation Act of Maine. Almost 36 years later, on March 22, 1977, Claimant filed a claim for benefits under the Longshoremen's and Harbor Workers' Compensation Act. On April 26, 1977, Respondents filed their answer denying coverage.

Claimant's contention is a simplistic one: his claim is timely, under Sec. 30(f), in that Respondents had not, at any time prior to the filing of his claim in 1977, filed the report of injury required by Sec. 30(a); in 1962, twenty-one years after his injury, the Supreme Court in Calbeck v. Travelers Insurance Co., 370 U.S. 114, held for the first time that injuries on ships under construction were compensable under the Act, even though they might also be compensable under State law; Calbeck's construction of the Act is retroactive to the date of enactment, 1927; and he has made no binding election of remedies.

Shea v. Texas Employers' Insurance Association, 383 F.2d 16 (5th Cir. 1967), identical in all material respects with the facts here, is dispositive and requires dismissal of the claim. There, as here, claimant had no right to benefits under the Act as the time of injury, had received benefits under State law and, following Calbeck, filed a claim under the Act. Finding the election of remedies defense inapplicable for the reason that, at the time of injury, claimant had no remedy under the Act, the Court

of Appeals nevertheless held that, after the State judgment conclusively established that recovery may validly be provided by State law, the claim no longer was covered under Sec. 3(a) of the Act, which provided for benefits "only if recovery for disability or death through workmen's compensation proceedings may not validly be provided by State law."

ORDER

IT IS ORDERED that the claim be, and the same hereby is, DISMISSED.

/s/ William A. Gershuny
WILLIAM A. GERSHUNY
Administrative Law Judge

Dated: November 3, 1978
Washington, D.C.

APPENDIX E

144 Me. 162 (1949)

SIMPSON'S CASE

Sagadahoc. Opinion, May 18, 1949.

Workmen's Compensation. Statutes. Services and Aids.

The expenditures of an employer for services and aids furnished an employee in accordance with the provisions of Section 9 of the Workmen's Compensation Act do not constitute a part of the compensation payable to him under Section 11 of the act.

The Workmen's Compensation Act is intended primarily, to provide employees injured in industrial accidents with compensation during periods of total and partial incapacity limited in terms of both time and money.

The services and aids contemplated by Section 9 of the act are incidental to the compensation payable to him under subsequent sections, except so far as they are available before the beginning of the period during which such compensation is payable.

The services and aid to which an employee is entitled under Section 9 of the act are available to him before and during the time compensation is payable to him but not thereafter.

At the expiration of the maximum period, during which an injured employee is entitled to have compensation paid to him, or upon the payment, or accrual, of the maximum amount so payable, the authority of the commission in connection with the services and aids to which Section 9 is applicable terminates, except so far as it may be called upon to determine allowances for services and aids furnished during the compensation period.

ON APPEAL.

Appeal from *pro forma* decree entered pursuant to Industrial Accident Commission order. Appeal sustained. Case fully appears in opinion.

Hutchinson, Pierce, Atwood, Scribner, for petitioner.

William B. Mahoney, John P. Carey,
for Bath Iron Works Corporation and American Mutual Liability Insurance Company, respondents.

SITTING: STURGIS, C. J., THAXTER, MURCHIE, TOMPKINS, FELLOWS, MERRILL, JJ.

MURCHIE, J. The propriety of the decision of the Industrial Accident Commission, referred to hereafter as the "Commission," under review, on this appeal of the defendants from a *pro forma* decree of the Superior Court entered pursuant thereto, must be determined by construing the second and closing sentence of the first paragraph of Section 9 of The Workmen's Compensation Act, referred to hereafter as the "Act," as it was effective at the time of the industrial accident to which the proceedings relate, November 21, 1941, R. S., 1930, Chap. 55. The controlling language is:

> "The amount of such *services and aids* shall not exceed one hundred dollars unless a longer *period* or a greater sum is allowed by the commission."

The emphasized words (emphasis having been supplied) refer to the "reasonable and proper medical, surgical and hospital services, nursing, medicines and mechanical surgical aids" which the preceding sentence declares an employee shall be entitled to and the "first thirty days after the injury," during which it is there said he shall be so entitled. The "services and aids" will be so referred to hereafter. The quoted language has been contained in the Act since the enactment of P. L., 1919, Chap. 238, referred to hereafter as "the 1919 Act," where the services and aids were reenumerated instead of being referred to by a collective phrase. Section 10. It is now found in R. S., 1944, Chap. 26, Sec. 9, with immaterial changes.

The employee of the present proceedings, Donald J. Simpson, was injured so severely, while working as a welder in

the employ of Bath Iron Works Corporation, that complete paralysis from the waist down resulted. In the period commencing November 28, 1941, and ending April 8, 1948, compensation was paid to him, or accrued in his favor, aggregating the maximum amount of $6,000, payable to him under the Act, and his employer, or its insurer, paid out in addition thereto a substantial sum in excess of $100 for services and aids to him, the exact amount of which is not disclosed in the record. The settlement receipt given the employer, or its insurer, by the employee, acknowledging that the full sum of $6,000 had been paid to him, is dated June 26, 1948. During the period commencing April 6, 1948 and ending May 24, 1948, the employee paid money, and incurred charges, for services and aids, and for living expenses, all of which he and a nurse, supplying some of them, considered payable by his employer. When they were not paid, petitions were filed by the employee and the nurse, appropriate for having the amount payable therefor determined by the Commission, if its authority to act in connection therewith had not terminated. Awards of $39.69 and $105 were made thereon, covering a part of each claim, the amounts in excess being disallowed as representing "the ordinary expense of living" or as not representing expenses the employee "would not have had if he had had no injury."

The importance of the principle involved cannot be measured by the amount of money in issue. This is manifest when consideration is given to the claims of the parties. The petitioners assert that the Commission has authority to enlarge the period of time during which an employee shall be entitled to services and aids, and the amount to be paid therefor, without limit, except as the latter may be controlled by the words "reasonable and proper" in the first sentence of Section 9 of the Act, references in the sentence carrying the language to be construed to "the nature of the injury or the process of recovery," and an over-all provision in Section 32 that no "petition of any kind, except for review of incapacity, may be filed more than seven years fol-

lowing an accident." The employer asserts that the authority terminates as to each employee when he has been paid the maximum amount of compensation payable to him.

The petitioners ground their claim on the declaration of Section 8 of the Act, that an employee:

> "shall be paid compensation and furnished medical and other services;"

the references to "compensation and medical benefits," "compensation or other benefits," "compensation or medical benefits," "compensation and benefits" and "compensation or benefits" in Sections 15, 17, 24 and 27 of the Act, and of P. L., 1929, Chap. 300, referred to hereafter as "the 1929 Act," by contract with the references in the corresponding sections of the 1919 Act, Sections 13, 8, 26 and 28, to "compensation" alone; and particularly a change made in Section 9 of the 1919 Act, with which Section 10 of the 1929 Act compares, whereby the provision that no "compensation except" services and aids should be paid during a waiting period was changed to one that "compensation" should begin at a stated time after incapacity. Special emphasis is laid on the fact that this court in *Melcher's Case*, 125 Me. 426; 134 A. 542, said by way of dictum, on September 28, 1926, that money paid by an employer for services and aids must be considered as compensation because Section 9 of the 1919 Act, then effective, referred to them as such, and that, thereafter, the 1929 Act made it plain that such expenditures do not constitute a part of the maximum compensation payable to an employee.

Authorities are cited, both in the Commission decision and in the petitioners' brief, to support such a construction and they would be adequate for the purpose if authority on the point was needed. It is not. Those authorities, without distinguishing between those cited by the Commission and the petitioners, are *Petraska* v. *National Acme Co. et al.*, 95 Vt. 76; 113 A. 536; *Industrial Commission et al.* v. *Hammond*, 77 Colo. 414; 236 P. 1006; *Cardillo et al.* v. *Liberty*

Mutual Insurance Co., 69 App. D. C. 330; 101 F. (2nd) 254; *Morris* v. *Laughlin Chevrolet Co.* et al., 217 N. C. 428; 8 S. E. (2nd) 484; 128 A. L. R. 136, and an annotation following the report of the last of these cases in A. L. R.

If there was any point in deciding whether the money spent by the employer, or its insurer, for services and aids to Donald J. Simpson on account of the injuries he suffered on November 21, 1941 should be counted as a part of the $6,000 in compensation payable to him under the Act, the decision that it should not would have to be made without reference to any of the authorities aforesaid. The intention of the Act in that regard is made crystal clear by its language. On the actual issue, i. e. whether the authority of the Commission to extend services and aids beyond the period of 30 days, and the amount of $100, terminated as and when he had received, or became entitled to, the maximum amount of compensation payable to him, those authorities have no bearing.

On that issue the position taken by the employer has support in the decision of the Massachusetts Court in *George A. Meuse's Case*, 270 Mass. 29; 169 N. E. 517, 518. That the Massachusetts law in the sections corresponding to Sections 8, 15, 17, 24 and 27 of our Act makes no reference to "medical benefits," "other benefits" or "benefits," but to "compensation" alone, supplies no warrant for construing our Act, as the petitioners do, as intended to provide "two distinct types of benefits" for an employee, each having no relation to the other. The Act was intended primarily to provide employees with compensation for incapacity. Services and aids are incidental to such compensation, except so far as they are available before the beginning of the period during which compensation is payable. The Massachusetts Court, referring to the phrase "for a longer period" in the Massachusetts Act, said, in *Meuse's Case, supra*, that it:

> "means a period longer than two weeks; a period which is to continue for such a part of the compen-

> sation period as the * * Board * * should in its discretion determine,"

and later:

> "But the jurisdiction of the board was entirely at an end * * * when the compensation period was passed."

A further statement of the Massachusetts Court in that case is eminently appropriate in the present one, i. e. that it:

> "is a hard case; * * * no amount of money * * * will compensate the employee; but that affords no justification for reading into the statute a meaning * it does not contain."

The function of the Commission, and of this court in a case brought to it by appeal from a decision of the Commission, is to construe the Act without either adding to or subtracting from its language. The mandate of Section 29 of the Act for liberal construction of its provisions (now R. S., 1944, Chap. 26, Sec. 30) provides no warrant for administrative or judicial creation of rights or liabilities under the guise of construction. The measure of liberality is for legislative and not judicial determination. The enactment of the first Workmen's Compensation Act in this state, P. L., 1915, Chap. 295, established two measures for limiting the time during which its benefits should be available to employees. A time measure was fixed at 500 weeks, and a money measure at $3,000. Sec. 14. The money measure was increased to $4,200 in the 1919 Act, Sec. 14, to $6,000 in the 1929 Act, Sec. 11, and stands at $7,500 since the enactment of P. L., 1943, Chap. 328. The time measure has remained constant. The petitioners do not claim that the language to be construed, when written into the Act by Section 10 of the 1919 Act, evidenced such a legislative intention, or could have been construed, as they now claim. Their assertion is that the changes made in other sections of the Act by the 1929 Act, coupling compensation with

services and aids by a variety of wordings, show the intention they assert. The particular sections and the pertinent words are quoted *supra*.

Collectively the changes made by them cannot be said to show any intention with reference to services and aids except to eliminate the possibility that money paid for them should be considered a part of the maximum amount of compensation payable to an employee. They did not enlarge the overall controls except so far as time should be measured by money when $4,200, instead of $3,000, was paid out in less than 500 weeks; nor did the change made in Section 10 of the 1919 Act, in rewriting it as Section 9 of the 1929 Act, providing that an employee should be "entitled" to services and aids where the earlier recital had been that an employer should "promptly furnish" them. The provision of Section 8, quoted *supra*, is followed by the words "as hereinafter provided," indicating that the measures of the compensation and the services, by which term services and aids are there designated, are to be found in subsequent sections. Those measures are the ones stated in terms of time and money. Since the enactment of the 1929 Act, as before, services and aids are available to an employee before and during the time he is entitled to draw compensation but not thereafter. At the expiration of the maximum period during which he is entitled to draw it, or upon the payment, or accrual, of the maximum amount payable to him, without reference to services and aids, the Commission's authority in connection with services and aids terminates, except so far as it may be called upon to determine allowances for those furnished during the compensation period. The Commission had no authority to make the awards carried in the decision under review.

Appeal sustained.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 81-1455.

DONALD J. SIMPSON,
Claimant, Petitioner,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
and
BATH IRON WORKS CORPORATION, ET AL.,
Respondents.

DECREE

Entered: June 23, 1982

This cause came on to be heard on petition for review of a final order of the Benefits Review Board, and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged, and decreed as follows: The decision of the Benefits Review Board is vacated and the cause is remanded for further proceedings consistent with the opinion filed this day.

Costs to petitioner.

By the Court:
/s/ DANA H. GALLUP
Clerk.

APPENDIX G

RELEVANT STATUTES

U.S. Code, 33 U.S.C. § 903(a).

(a) Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law.

[33 U.S.C. § 903(a) is set forth above as it read before the 1972 amendments to the LHWCA. As the Court of Appeals noted (App. 2a), the parties agreed that the amendments had no effect on Simpson's already existing claim. Therefore, all statutory provisions here are pre-1972 amendments.]

[pre-1972 amendments]

33 U.S.C. § 913(a).

(a) The right to compensation for disability under this Act shall be barred unless the claim therefor is filed within one year after the injury. If payment of compensation has been made without an award on account of such injury or death, a claim may be filed within one year

after the date of last payment. Such claim shall be filed with the deputy commissioner in the compensation district in which such injury or death occurred.

33 U.S.C. § 920(a).

In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary--

(a) That the claim comes within the provisions of this Act.

33 U.S.C. § 930(a)(f).

(a) Within ten days from the date of any injury or death or from the date that the employer has knowledge of a disease or infection in respect of such injury, the employer shall send to the Secretary a report setting forth (1) the name, address, and business of the employer; (2) the name, address, and occupation of the employee; (3) the cause and nature of the injury or death; (4) the year, month, day, and hour when and the particular locality where the injury or death occurred; and (5) such other information as the Secretary may require. A copy of such report shall be sent at the same time to the deputy commissioner in the compensation district in which the injury occurred.

(f) Where the employer or the carrier has been given notice, or the employer (or his agent in charge of the business in the place where the injury occurred) or the carrier has knowledge, of any injury or death of an employee and fails, neglects, or refuses to file report thereof as required by the provisions of subdivision (a) of this section, the limitations in subdivision (a) of section 13 of this Act shall not begin to run against the claim of the injured employee or his dependents entitled to compensation, or in favor of either the employer or the carrier, until such report shall have been furnished as required by the provisions of subdivision (a) of this section.

Office - Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

No. 82-494

In the Supreme Court of the United States

OCTOBER TERM, 1982

BATH IRON WORKS CORPORATION, ET AL., PETITIONERS

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the decision in *Calbeck* v. *Travelers Insurance Co.*, 370 U.S. 114 (1962), which clarified the jurisdictional scope of the Longshoremen's and Harbor Workers' Compensation Act of 1927, should be applied retroactively.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-494

BATH IRON WORKS CORPORATION, ET AL., PETITIONERS

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DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 681 F.2d 81. The decision of the Benefits Review Board (Pet. App. 21a-62a) is reported at 13 Ben. Rev. Bd. Serv. (MB) 970. The decision and order of the administrative law judge (Pet. App. 63a-65a) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 20a) was entered on June 23, 1982. The petition for a writ of certiorari was filed on September 20, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Respondent Donald J. Simpson, an employee of petitioner Bath Iron Works Corporation, was injured on November 21, 1941, while working as a welder on board a vessel under construction on a marine railway at the Bath Iron Works shipyard (Pet. App. 2a). He fell approximately 50 feet from the deck of the vessel, landing on his back on a set of pipes. The accident left him a paraplegic, confined to a wheelchair, and totally disabled (*id.* at 2a, 23a, 63a). Simpson sought and received benefits under the Maine Workmen's Compensation Act at the maximum rate of $18 per week from November 1941 to April 1948, when his accumulated compensation reached the state's $6,000 ceiling (*id.* at 2a, 23a). He then petitioned the State Industrial Commission for further reimbursement of his continuing medical expenses and supplies. The Supreme Judicial Court of Maine held that there was no authority under state law to award any benefits once the $6,000 ceiling on disability compensation had been reached. *Simpson's Case*, 144 Me. 162, 66 A.2d 417 (1949); Pet. App. 66a-71a.

On March 22, 1977, Simpson filed a claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. (& Supp. IV) 901 *et seq.* He sought $1,500 (the difference between the $6,000 recovered under the Maine Act and the $7,500 maximum under the federal Act in 1941) plus reimbursement for his medical expenses (unlimited under the federal Act, but not under state law) (Pet. App. 2a). The administrative law judge (ALJ) denied Simpson's claim, relying solely on the Fifth Circuit's decision in *Shea* v. *Texas Employers' Insurance Association*, 383 F. 2d 16 (1967). Applying *Shea*, the ALJ concluded that Simpson was not covered under the LHWCA because he "had no right to benefits under the [federal] Act" (Pet. App. 24a) prior to this Court's decision in *Calbeck* v. *Travelers Insurance Co.*, 370 U.S. 114 (1962).

The *Calbeck* decision established that, irrespective of concurrent state coverage, federal coverage extended to all injuries on "navigable waters of the United States (including any * * * dry dock)" (33 U.S.C. 903(a); Pet. App. 64a-65a).[1] The ALJ reasoned that, prior to *Calbeck*, a claimant who received a state compensation judgment was excluded from federal coverage by virtue of Section 3(a) of the LHWCA. That section provided for benefits "only * * * if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law." Former Section 3(a) (previously codified at 33 U.S.C. (1970 ed.) 903(a)).[2] Pet. App. 6a.

Simpson appealed to the Benefits Review Board, pursuant to Section 21(b)(3) of the LHWCA, 33 U.S.C. 921(b)(3). The Board affirmed the denial of benefits in a 2-1 decision (Pet. App. 21a), although employing a different rationale than the ALJ. The Board majority disagreed (*id.* at 26a-27a) with the ALJ's reliance on *Shea* v. *Texas Employers' Insurance Association, supra*, on the ground that that opinion was inconsistent with this Court's holding in *Calbeck* that the LHWCA, as originally written, applied to "all injuries sustained by employees on navigable waters whether or not a particular injury might also have been within the constitutional reach of a state workmen's compensation law." *Calbeck* v. *Travelers Insurance Co., supra*, 370 U.S. at 117 (footnote omitted). The Board nevertheless affirmed the ALJ's denial of benefits, reasoning that, under the analysis

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[1]Petitioners do not dispute that Simpson's injury occurred on a "dry dock" within the meaning of this provision. See *Avondale Marine Ways, Inc.* v. *Henderson*, 346 U.S. 366 (1953).

[2]Congress removed the proviso of Section 3(a) from the Act in 1972. See generally *Sun Ship, Inc.* v. *Pennsylvania*, 447 U.S. 715, 720-721 (1980). It is undisputed that the 1972 amendments have no effect on Simpson's claim (Pet. App. 2a n.1).

in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971), *Calbeck* should not be applied "retroactively" to claims arising from injuries incurred before the decision (Pet. App. 47a). Rather than applying *Calbeck*, the Board determined that it would "apply the law in effect during the time when claimant's state claim was pending" (*ibid.*). The Board therefore achieved the same result as the ALJ because of its view that Section 3(a) of the LHWCA at the time of Simpson's injury "allowed recovery only under state compensation law for employees engaged in new ship construction" (Pet. App. 47a).[3]

Simpson sought review of the Board's decision in the court of appeals, pursuant to Section 21(c) of the Act, 33 U.S.C. 921(c). The Director participated as respondent and filed a brief in support of Simpson's petition for review. The court granted the petition and held that Simpson was entitled to benefits under the Act. The court first noted that "[i]t is clear that Simpson's injury fell within the coverage of the Act's jurisdictional rule, 33 U.S.C. § 903(a) (Section 3(a) of the Act) as it was interpreted in *Calbeck, supra*" (Pet. App. 2a; footnote omitted). Moreover, the court emphasized, "the retroactive applicability of judicial decisions of federal courts is the rule, not the exception" (*id.* at 7a). Using the Court's three-factor test in *Chevron Oil Co.* v. *Huson, supra*, the court below concluded that the general rule of retroactivity should obtain here.[4] Specifically, the

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[3]Board Member Miller dissented, reasoning that "*Calbeck* was an interpretive decision" (Pet. App. 51a), which the Supreme Court majority itself characterized as being fully consistent with prior case law (*id.* at 54a).

[4]The court noted one "question on which the Supreme Court has not yet given explicit guidance: should the [*Chevron Oil*] factors * * * be analyzed in light of the particular litigants in a given case, or in light of general patterns throughout society?" (Pet. App. 9a). The court decided that retroactivity should be determined in light of general, not particularized, interests (*ibid.*).

court concluded that: (1) "*Calbeck* was not an overruling decision," but rather was a clarifying opinion reasonably foreshadowed by prior case law (Pet. App. 10a); (2) "retroactivity would be consistent with *Calbeck's* purpose, and nonretroactivity inconsistent" (*id.* at 15a); and (3) the equities weigh in favor of retroactive benefits for injured employees, rather than a coverage exemption for employers, who "would have had only slight justification" for relying on an interpretation contrary to the one ultimately reached in *Calbeck* and whose actual reliance on such an erroneous interpretation was not "particularly extensive" (*id.* at 16a, 18a). Finally, the court summarily dismissed petitioners' other arguments, including the theory adopted by the Fifth Circuit in *Shea*, because "*Shea* misapprehended the import of *Calbeck*," which held that, notwithstanding Section 3(a) of the LHWCA, Congress in 1927 had authorized federal compensation for all work-related injuries on navigable waters (Pet. App. 19a).[5]

ARGUMENT

The court of appeals correctly concluded that the jurisdictional holding of *Calbeck* v. *Travelers Insurance Co., supra*, should be applied to this case, which arose out of injuries antedating that decision. As petitioner acknowledges, this is the first case that has considered the retroactivity of *Calbeck*; because that decision was announced in 1962, this issue is now largely of historical interest. *Shea* v. *Texas Employers' Insurance Association, supra*, which denied federal benefits to a claimant who had accepted a state award prior to *Calbeck*, is plainly incorrect and, as the

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[5]The court also summarily held that the situs requirement of the Act was met and that the election of remedies doctrine is inapplicable under *Calbeck* v. *Travelers Insurance Co., supra*, 370 U.S. at 131-132, and *Sun Ship, Inc.* v. *Pennsylvania, supra*, 447 U.S. at 724 (Pet. App. 19a-20a).

Benefits Review Board noted (Pet. App. 27a), "has not been used as precedent for courts deciding similar cases." Further review by this Court is therefore unwarranted.

1. The court of appeals correctly applied this Court's guidelines, most clearly set forth in *Chevron Oil Co.* v. *Huson*, concerning the retroactivity of opinions construing legislative enactments. The general presumption, of course, is that court decisions are fully retroactive. See *Robinson* v. *Neil*, 409 U.S. 505, 507-508 (1973). Notwithstanding this general presumption of retroactivity, however, *Chevron Oil* enumerates three factors that may counsel in favor of appiying a particular judicial construction only prospectively.[6] The court below properly found that none of these factors indicates that this Court's interpretive decision in *Calbeck* v. *Travelers Insurance Co.*, *supra*, should be denied full, retroactive effect.

a. Under the first *Chevron Oil* factor, any "decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed." *Chevron Oil Co.* v. *Huson*, *supra*, 404 U.S. at 106

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[6]The court of appeals addressed each of these three factors after making the threshold determination that retroactivity questions should be decided in light of general societal interests rather than in light of the specific facts in a given case (Pet. App. 9a-10a). Petitioners do not quarrel with this proposition as a general matter, but argue only that the court should have considered the retroactivity question by analyzing the state of the law "at the time the particular claim in this case arose" rather than at the time of the *Calbeck* decision (Pet. 14). This approach, however, would completely undermine the court's conclusion that a retroactivity decision "should not be controlled by specific, possibly aberrational facts" and that "the presumption of retroactivity (and the interest in uniformity) is outweighed [only] when there are sufficient indications of justifiable *societal* reliance on a different rule" (Pet. App. 10a; emphasis in original).

(citations omitted). The court below reviewed the precedent before *Calbeck* and correctly concluded that "the legal waters were so muddy before 1962 that it would have been quite imprudent" for employers to have relied on a construction that the LHWCA did not apply to *all* work-related injuries on the water (Pet. App. 12a).

The debate in the early cases was whether Section 3(a) of the 1927 Act, 33 U.S.C. (1928 ed.) 903(a), extended federal coverage only if the states could not constitutionally provide relief for an injury under the "maritime but local" doctrine, which distinguished cases within the reach of state jurisdiction from those for which federal jurisdiction was deemed exclusive. See generally *Calbeck* v. *Travelers Insurance Co., supra*, 370 U.S. at 115-120; *Davis* v. *Department of Labor*, 317 U.S. 249, 252-253 (1942). This Court definitively resolved the dispute in *Calbeck* when it construed the state-law proviso in Section 3(a) as follows (370 U.S. at 126-127; footnotes omitted):

> We conclude that Congress used the phrase "if recovery * * * may not validly be provided by State law" in a sense consistent with the delineation of coverage as reaching injuries occurring on navigable waters. By that language Congress reiterated that the Act reached all those cases of injury to employees on navigable waters as to which [certain pre-1927 cases] had rendered questionable the availability of a state compensation remedy. Congress brought under the coverage of the Act all such injuries whether or not a particular one was also within the constitutional reach of a state workmen's compensation law.

Petitioners argue that this Court's decision in *Calbeck* "was not foreshadowed by prior law" (Pet. 23) and that "[b]y virtue of the clear language of the statute" and existing

precedent,[7] Simpson was not entitled to benefits under the LHWCA at the time of his injury in November 1941 (Pet. 19). As the court of appeals noted (Pet. App. 12a-13a n.11), however, the *Calbeck* decision did not, as petitioners suggest, read the Section 3(a) proviso out of the Act. Rather, the Court in *Calbeck* merely adopted one supportable interpretation of Section 3(a) over another, in the course of construing ambiguous statutory language in light of its legislative history. Moreover, petitioners' charge that *Calbeck* was a clear break with past precedent is belied by the *Calbeck* majority opinion, which analyzed past precedent and explained that the Court's "previous decisions under the Act are entirely consistent" with the conclusion in *Calbeck*. 370 U.S. at 127. See, *e.g.*, *Avondale Marine Ways, Inc.* v. *Henderson*, 346 U.S. 366 (1953); *Davis* v. *Department of Labor, supra*; *Parker* v. *Motor Boat Sales, Inc.*, 314 U.S. 244 (1941) (discussed in *Calbeck* v. *Travelers Insurance Co., supra*, 370 U.S. at 127-129). See also *De Bardeleben Coal Corp.* v. *Henderson*, 142 F.2d 481, 483-

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[7]Petitioners overestimate (Pet. 17-19) the significance of the Court's holding in *Grant Smith-Porter Ship Co.* v. *Rohde*, 257 U.S. 469 (1922), that a state compensation remedy could constitutionally apply to an injured shipbuilder. That case, decided well before enactment of the Longshoremen's Act, obviously does not reflect the congressional intent embodied in the subsequent statute. Moreover, *Rohde* was not so broad and unequivocal a recognition of state authority as petitioners describe. *Rohde* held that federal maritime law *was* applicable to a shipbuilder's injury on navigable waters, but that federal law could be modified or supplemented by state compensation law in the discrete circumstances of that case, where the parties had contracted in contemplation that the state remedy would apply. 257 U.S. at 476-477. The Court's holding that the state remedy could validly apply to modify the general maritime law in that context, where Congress had not authorized a federal remedy, obviously does not establish whether state laws could validly apply to similar employment after Congress had enacted the Longshoremen's Act.

484 (5th Cir. 1944) (described by the court below as embodying "precisely the *Calbeck* analysis, eighteen years before *Calbeck*" (Pet. App. 15a)).

b. The second *Chevron Oil* factor is " 'whether retrospective operation [of the rule in question] will further or retard' " the purpose and effect of the rule. *Chevron Oil* v. *Huson, supra*, 404 U.S. at 107, quoting *Linkletter* v. *Walker*, 381 U.S. 618, 629 (1965). The court below properly reasoned that *Calbeck* "sought to implement Congress's desire that the Longshoremen's Act provide the federal scheme of compensation to a certain, clearly identified class of workers," namely, those injured on navigable waters in the course of their employment (Pet. App. 15a). Thus, retroactivity would be consistent with *Calbeck's* purpose because "[r]etroactive application would provide that certainty equally to all employees injured since the passage of the Act" while "[n]onretroactivity would leave workers injured before 1962 without the certain remedy that the 1927 Congress supposedly intended to provide" (*ibid.*). Petitioners' only challenge to this conclusion is to suggest that certainty would not be fostered by retroactive application of *Calbeck* because "a flood of litigation would probably result by workers and employers similarly situated to the claimant and the employer in this case" (Pet. 24). But, as the court below noted, this fear of a flood of litigation is "a bald assertion, unsupported by evidence or expert predictions," and moreover is illogical (Pet. App. 16a). "At the time *Calbeck* was decided, the theory of federal nonretroactivity was still inchoate. Any flood that the decision might have stimulated would certainly have come early in the 1960's, not in the 1980's" (*ibid.*).[8]

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[8]Thus, petitioners' claim (Pet. 11) that the decision below is important and far-reaching is not substantiated. It is more logical to conclude that this case is a novel one, unlikely to have a widespread effect.

c. The third *Chevron Oil* factor requires a court to weigh the equities, for " '[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the "injustice or hardship" by a holding of nonretroactivity.' " *Chevron Oil* v. *Huson, supra*, 404 U.S. at 107, quoting *Cipriano* v. *City of Houma*, 395 U.S. 701, 706 (1969). The lower court considered both the equities in favor of claimants like Simpson who "assert that they should receive the benefits that the 1927 Congress said they were entitled to" and those of employers like Bath Iron Works who relied on the unsettled state of case law and chose to "forgo insurance against liability under the federal act" (Pet. App. 16a). The court appropriately determined that the equities do not weigh in favor of the employers.

First of all, in view of the unsettled and conflicting case law in the early years of the Act's existence, "an employer would have had only slight justification" for relying on an interpretation that resulted in denial of federal benefits for *any* injury on the water (Pet. App. 16a). "Furthermore, the extent of that reliance—though not easily gauged—does not seem to have been substantial" (*ibid.*). Specifically, the court of appeals doubted that, "[g]iven the [$7,500] ceiling on federal compensation," the potential gross liability would be very large for employers who chose not to carry federal insurance before *Calbeck* (*id.* at 17a; footnote omitted). Similarly, on the assumption that the extent of an employer's reliance could be measured by its decision to forgo purchasing LHWCA insurance coverage, the court considered "the amount of money employers in [Bath Iron Works'] position would have saved by limiting their insurance coverage to state liability" (Pet. App. 17a). Available sources indicate that, for a small fee, the standard workers' compensation policy in effect at the time could have been extended to cover operations subject to the federal Act (*id.*

at 17a-18a). In sum, the court concluded, "[n]o matter how one approaches the measurement of employer reliance, we have no reason to think it was particularly extensive" (*id.* at 18a). Thus, the equities do not tip in favor of the employers over a claimant, like Simpson, for whom Congress intended to provide federal benefits.[9]

2. Petitioners' final argument (Pet. 27-30) is that this suit should be barred by virtue of the "election of remedies" doctrine. The court of appeals correctly rejected this argument (Pet. App. 20a), based on *Sun Ship, Inc.* v. *Pennsylvania*, 447 U.S. 715, 724 (1980), and *Calbeck* v. *Travelers Insurance Co., supra*, 370 U.S. at 131-132.[10] In *Calbeck*,

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[9]This result is particularly appropriate in view of the fact that all the employer had to do to trigger the statute of limitations under the federal Act was to file a Section 30(a) report of injury. 33 U.S.C. 930(a). See Pet. App. 56a (Miller, J., dissenting).

[10]The cases on which petitioners rely (Pet. 27-29) do not support their position. In *Texas Employers Insurance Association* v. *Calbeck*, 249 F. Supp. 217 (E.D. Tex. 1966), aff'd on different grounds *sub nom. Shea* v. *Texas Employers' Insurance Association, supra*, and *Windrem* v. *Bethlehem Steel Corp.*, 293 F. Supp. 1 (D.N.J. 1968), the claimant had successfully asserted the proposition, in proceedings on a state claim, that state law *and not the Longshoremen's Act* applied to his injury. Thus, each case was governed by collateral estoppel principles, and their "election of remedies" statements were, at best, dicta. Furthermore, the issue framed in the state litigation in each of those cases supported the factual proposition that the claimant had made an intentional choice to forgo a known available remedy under the Longshoremen's Act in favor of a state remedy regarded as inconsistent with it. In this case, on the contrary, no issue of LHWCA coverage was actually litigated or decided in the Maine proceedings, and Simpson did not know of the availability of a Longshoremen's Act remedy. *Newport News Shipbuilding & Dry Dock Co.* v. *Director, OWCP*, 583 F. 2d 1273 (4th Cir. 1978), does not support the proposition, ascribed to it by petitioners, that the election doctrine provided a legitimate defense under the pre-1972 Longshoremen's Act; rather, while acknowledging that a number of earlier cases had referred to the doctrine, *Newport News* questioned their correctness and found the doctrine to be both disfavored and, in any event, inapplicable where the two remedies in question are not mutually exclusive and do not require the party seeking

one of the employees had previously received state benefits, but that circumstance was held not to bar a supplemental award under the federal Act. *Id.* at 131. To be sure, the *Calbeck* Court referred to the particular circumstances of that case in rejecting the election argument, but any contention that *Calbeck's* ruling on this point can be limited to its facts is foreclosed by the Court's recent decision in *Sun Ship, Inc.* v. *Pennsylvania, supra.* There the Court expressly recognized the general rule that supplemental relief is available under the LHWCA after a smaller award under state law. 447 U.S. at 724.[11]

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them to assume inconsistent positions. *Id.* at 1276-1278. As this Court recently noted, rather than being inconsistent and mutually exclusive so as to warrant application of the election doctrine, "the pre-1972 Longshoremen's Act ran concurrently with state remedies in the 'maritime but local' zone." *Sun Ship, Inc.* v. *Pennsylvania, supra*, 447 U.S. at 720; see also *id.* at 724 n.6.

[11]The Court in *Sun Ship* also noted the "remote contingency" that "if a particular state compensation law provision does indisputedly declare its awards final, a conflict with the LHWCA may possibly arise where a claimant seeks inferior state benefits in the first instance." 447 U.S. at 724 n.6. But there is no contention that the Maine law contains such a provision. (As noted in another case decided the same Term as *Sun Ship*, it appears that only the Nevada compensation statute contains a provision with the requisite language making awards indisputably exclusive of other compensation remedies. *Thomas* v. *Washington Gas Light Co.*, 448 U.S. 261, 275 n.21 (1980) (plurality opinion)). Moreover, the Court suggested in *Sun Ship* that the federal Act would preempt such a state provision, if the provision's application even threatened to deny a supplemental award under the federal Act. 447 U.S. at 724 n.6.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

T. TIMOTHY RYAN, JR.
Solicitor of Labor

KAREN I. WARD
Associate Solicitor

KERRY L. ADAMS
Counsel for Appellate Litigation
Department of Labor

NOVEMBER 1982

DOJ-1982-11

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OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

No. 82-494

BATH IRON WORKS CORPORATION,

and

AMERICAN MUTUAL LIABILITY INSURANCE COMPANY,

Petitioners

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

and

DONALD J. SIMPSON,

Respondents

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Now comes the Respondent, Donald J. Simpson, by and through his undersigned attorney and asks leave of this Honorable Court to proceed in forma pauperis should Petitioners, Bath Iron Works Corporation be granted a writ of certiorari to the United States Court of Appeals for the First Circuit. Respondent's Affidavit in support of this motion is attached hereto.

Dated: November 19, 1982

McTEAGUE, HIGBEE, LIBNER, REITMAN & PRIEST

By: _____
Jonathan W. Reitman, Esq.
Attorney for Respondent Donald J. Simpson

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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

NO. 82-494

BATH IRON WORKS CORPORATION, and AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, Petitioners	:	AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS
v.	:	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, and DONALD J. SIMPSON, Respondents	:	

I, DONALD J. SIMPSON, being duly sworn, depose and say: this Affidavit is being executed for use in support of a Motion for Leave to Proceed in forma pauperis in the Supreme Court of the United States in a proceeding in which I am the Respondent. The proceeding involves an action instituted by me in a claim for benefits under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901 et. seq. The Administrative Law Judge below initially denied the claim. I appealed that denial to the Benefits Review Board which affirmed the dismissal of the claim, although its decision was based on a rationale different from that of the Administrative Law Judge. The Benefits Review Board held that the Supreme Court's decision in Calbeck v. Travelers Insurance Company, 370 U. S. 114 (1962), which extended the jurisdictional scope of the Longshoremen & Harbor Workers' Compensation Act,

could not be appealed retroactively so as to bring this action within the jurisdiction of the Longshoremen & Harbor Workers' Compensation Act.

The United States Court of Appeals for the First Circuit, CA#81-1455 vacated the decision of the Benefits Review Board holding that Calbeck should govern all decisions under the Longshoremen's Act of 1927.

Petitioners seek this Court's Review, by Petition for Certiorari, of the action taken by the Court of Appeals in vacating the Benefits Review Board's dismissal of my claim.

As a result of my injuries, I am a paraplegic, and my income is very small. I am unable to pay the fees and costs of this proceeding, or to give security therefor and still be able to provide myself with the necessities of life. I ask leave, therefore, to proceed in forma pauperis.

Dated: November 19, 1982

Donald J. Simpson

Donald J. Simpson

STATE OF MAINE
CUMBERLAND, SS. DATED: 11/19/82

Personally appeared the above named Donald J. Simpson and made oath that the foregoing Affidavit is true and correct to the best of his knowledge and belief.

Before me,

Anita C. Mercer

Notary Public

RECEIVED
NOV 22 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

CERTIFICATE OF SERVICE

1. My name is Jonathan W. Reitman, Esq.; I am an attorney authorized to practice law in the State of Maine, and a member in good standing of the bar of the United States Supreme Court.

2. I hereby certify and state, pursuant to Rule 24(a) of the Rules of the Supreme Court of the United States, that the Motion for Leave to Proceed In Forma Pauperis with attached Affidavit in the matter of Bath Iron Works Corporation and American Mutual Liability Insurance Company, Petitioners, v. Director, OWCP, U. S. Department of Labor, and Donald J. Simpson, Respondents was, to my personal knowledge, filed by said Respondent on November 19, 1982, in accordance with Rule 25(d), by depositing one (1) copy of the said Motion and supporting Affidavit in the United States Post Office in Brunswick, Maine, with first class postage, pre-paid, certified, properly addressed to the Clerk of the United States Supreme Court, on November 19, 1982.

3. I also certify and state that one (1) copy of said Motion and supporting Affidavit was served on each of the Petitioners in this matter and to the Court of Appeals for the First Circuit, by depositing one (1) copy in the United States Post Office in Brunswick, Maine, on November 19, 1982, with first class postage, pre-paid, certified, properly addressed to the following individuals:

a) Bath Iron Works Corporation and American Mutual Liability Insurance Company, by mailing one (1) copy to counsel of record:
Stephen Hessert, Esq.
Norman & Hanson, P. O. Box 4600 DTS
Portland, Maine 04112

Thomas F. Monaghan, Esq.
Monaghan & Leahy, 95 Exchange Street,
Portland, Maine 04101

b) Court of Appeals for the First Circuit, by mailing one (1) copy to Dana Gallup, Clerk, 1606 John W. McCormack Post Office and Courthouse, Boston, MA 02109

c) Director, OWCP, U. S. Department of Labor, by mailing one (1) copy to the Office of the Associate Solicitor, Frances Perkins Building 200 Constitution Avenue, N.W. Suite N-2716, NDOL, Washington, D.C. 20210; and

d) One (1) copy to Solicitor General Department of Justice, Washington, D.C. 20530

as is required by Rule 25(d).

Dated: November 19, 1982

Jonathan W. Reitman, Esq.

STATE OF MAINE
CUMBERLAND, SS.

Dated: 11/19/82

Personally appeared the above-named Jonathan W. Reitman and made oath that the foregoing Certificate of Service is true and correct to the best of his knowledge and belief.

Before me,

Notary Public

192 Dec 18 Cert

IN THE SUPREME COURT OF THE UNITED STATES

No. 82-494

RECEIVED
NOV 27 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

BATH IRON WORKS CORPORATION, and AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, Petitioners v. DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, and DONALD J. SIMPSON, Respondents	MOTION OF RESPONDENT, DONALD J. SIMPSON, RELATING TO PETITION FOR CERTIORARI FILED BY PETITIONERS, BATH IRON WORKS AND AMERICAN MUTUAL INSURANCE COMPANY

NOW COMES the Respondent, Donald J. Simpson, by and through his undersigned counsel, and states as follows:

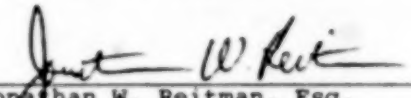
1. On September 20, 1982, the Petitioners in the above-captioned case petitioned this Honorable Court for a Writ of Certiorari from the decision of the First Circuit Court of Appeals. The Respondent acknowledges that the decision of the First Circuit Court of Appeals involves substantial federal questions, including but not limited to the interpretation to be given to the decision of this Court in Calbeck v. Travelers Insurance Company, 370 U. S. 114 (1962). In addition, this case involves significant questions of retroactivity, general maritime law, and interpretations to be accorded the Longshoremen & Harbor Workers' Compensation Act, 33 U.S.C. §901 et. seq.

2. On the other hand, the case appears to be one of limited applicability. The U.S. Department of Labor has indicated in the record below that there is no reason to believe that there would be any flood of litigation if the decision of the First Circuit Court of Appeals is allowed to stand. Upon information and belief, it is respectfully suggested that there are an extremely limited number of cases to which the factual pattern involved in this case at bar would apply.

WHEREFORE, the Respondent, Donald J. Simpson, takes no position in favor or in opposition to the Petition for Certiorari filed by the Petitioner. However, should this Honorable Court choose to grant certiorari in this matter, the Respondent, Donald J. Simpson, asks leave as requested in a previously filed motion, to proceed in forma pauperis for the reasons set forth in that motion and affidavit.

Dated: November 24, 1982

Respectfully submitted,



Jonathan W. Reitman, Esq.
Attorney for Respondent, Donald J. Simpson

CERTIFICATE OF SERVICE

1. My name is Jonathan W. Reitman, Esq.; I am an attorney authorized to practice law in the State of Maine, and a member in good standing of the bar of the United States Supreme Court.

2. I hereby certify and state that the Motion of Respondent, Donald J. Simpson, Relating to Petition for Certiorari Filed by Petitioners, Bath Iron Works and American Mutual Insurance Company in the matter of Bath Iron Works Corporation and American Mutual Liability Insurance Company, Petitioners, v. Director, OWCP, U. S. Department of Labor, and Donald J. Simpson, Respondents was, to my personal knowledge, filed by said Respondent on November 24, 1982, in accordance with Rule 25(d), by depositing one (1) copy of the said Motion in the United States Post Office in Brunswick, Maine, with first class postage, prepaid, certified, properly addressed to the Clerk of the United States Supreme Court, on November 24, 1982.

3. I also certify and state that one (1) copy of said Motion was served on each of the Petitioners in this matter and to the Court of Appeals for the First Circuit, by depositing one (1) copy in the United States Post Office in Brunswick, Maine, on November 24, 1982, with first class postage, prepaid, properly addressed to the following individuals:

a) Bath Iron Works Corporation and American Mutual Liability Insurance Company, by mailing one (1) copy to counsel of record:
Stephen Hessert, Esq.
Norman & Hanson, P. O. Box 4600 DTS
Portland, Maine 04112

Thomas F. Monaghan, Esq.
Monaghan & Leahy, 95 Exchange Street,
Portland, Maine 04101

b) Court of Appeals for the First Circuit, by mailing one (1) copy to Dana Gallup, Clerk, 1606 John W. McCormack Post Office and Courthouse, Room 409 Boston, MA 02109

c) Director, OWCP, U. S. Department of Labor, by mailing one (1) copy to the Office of the Associate Solicitor, Frances Perkins Building 200 Constitution Avenue, N.W. Suite N-2716, NDOL, Washington, D.C. 20210; and

d) One (1) copy to Solicitor General Department of Justice, Washington, D.C. 20530

as is required by Rule 25(d).

Dated: November 24, 1982

Jonathan W. Reitman, Esq.

STATE OF MAINE
CUMBERLAND, SS. November 24, 1982

Personally appeared the above-named Jonathan W. Reitman and made oath that the foregoing Certificate of Service is true and correct to the best of his knowledge and belief.

Before me,

Notary Public

My commission expires 4/3/88